

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Doe 1 and Doe 2, Plaintiffs, vs. School Board of Giles County, Defendant.	7:11-cv-00435
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PROCEEDINGS HELD BEFORE

THE HONORABLE MICHAEL F. URBANSKI, JUDGE
May 7, 2012
2:05 p.m. to 3:00 p.m.
Roanoke, Virginia
Motion for Summary Judgment

Appearances:

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1 (May 7, 2012, 2:05 p.m.)

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3 P R O C E E D D I N G S

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5 THE COURT: Good afternoon everyone.
6 Please call the case.

7 MR. CLERK: Doe 1 and Doe 2 vs. School
8 Board of Giles County, civil action 7:11-cv-00435.

9 THE COURT: All right. Good afternoon,
10 Ms. Glenberg. Nice to see you folks again. All
11 right. I appreciate all the papers that you
12 submitted. I can assure you that I've read all of
13 them. I read all the depositions. I have looked
14 at all the document entries including the briefs
15 that you filed on Friday, Ms. Glenberg. I looked
16 through all the documents that you filed on the
17 record, and I have a very good familiarity with
18 both the facts and the law.

19 I have read, if not all, most all of the
20 cases that you-all cited in your briefs as well.
21 So I have a number of questions for you all. It
22 seems to me Doe 1 and Doe 2 filed summary judgment
23 first, so I would like for them to argue first, and
24 you should feel free to argue in your argument to
25 deal with the motion to strike that was filed by

1 Giles County, and then we'll hear from the folks
2 from Giles County. Then we'll, like I said, I do
3 have many, many questions that I would like to talk
4 to you about today, but we'll take it up there. We
5 want to make sure that everybody has a full chance
6 to argue your position. So with that, Ms.
7 Glenberg.

8 MS. GLENBERG: Your Honor, no federal
9 court has upheld a display of the Ten Commandments
10 in a public school. Courts are particularly
11 vigilant in monitoring compliance with the
12 Establishment Clause in elementary and secondary
13 schools. Indeed in the VanOrden case both
14 (inaudible) and Justice Breyer's opinion were
15 careful to distinguish that case from the school
16 context.

17 The Court has said more than once that the
18 Ten Commandments in the Bible may be
19 constitutionally integrated into the curriculum.
20 But this is not that case and this is not the case
21 that should be the first to uphold the Ten
22 Commandments on the law of a public school because
23 the purpose is religious, the effect is religious,
24 the display is government not private speech and
25 the display is not integrated into the curriculum.

1 THE COURT: A large part of the argument
2 that Giles County makes in this case is that it is
3 secular, it's tied to the SOLS in the curriculum.
4 In fact, they have a long affidavit from the
5 superintendent with lots of attachments. They have
6 cited some examples in which a reference to the Ten
7 Commandments appears in a textbook or maybe two
8 textbooks. Which leads to the question, if the Ten
9 Commandments are in a textbook in the Giles County
10 that's used in the Giles County public schools,
11 therefore, it is to that extent part of the
12 curriculum. Why can it not be posted on a school
13 wall along with a host of other documents?

14 MS. GLENBERG: Well, Your Honor, I think
15 that that begs the question: What does it mean to
16 integrate the Ten Commandments within the
17 curriculum?

18 THE COURT: Certainly the Ten Commandments
19 are not mentioned in the SOLS, that much is clear.
20 I think maybe in one of the world history SOLS
21 there is a reference to the spread of Judaism but
22 the Ten Commandments are not mentioned in the
23 economics, civics, the government SOLS. So the
24 question is: If it can be in a textbook and there
25 is a reference to it in a textbook, why can't it be

1 on the wall?

2 MS. GLENBERG: There are several reasons.
3 First of all, to integrate does not mean simply to
4 take this element and put them in the same place
5 and just post them. It means to create a
6 comprehensive whole out of this element and the
7 display fails to do that because it fails to draw
8 any connection between the Ten Commandments, a
9 religious ancient document, and these other
10 documents that were all European or American in
11 origin and secular.

12 Furthermore, the page that we are talking
13 about from the one textbook in which is labeled
14 Roots of Democracy, it contains a representation of
15 the Ten Commandments, not the Ten Commandments,
16 themselves, and it also has a number of --

17 THE COURT: Is there a difference between
18 a representation of the Ten Commandments and the
19 Ten Commandments, themselves?

20 MS. GLENBERG: Your Honor, I think that
21 there might be just because in referencing the Ten
22 Commandments, and having a picture of it in the
23 textbook, the textbook is not telling the students
24 what the Ten Commandments are, just that it's a
25 document.

1 THE COURT: But there is a textbook that
2 has the Ten Commandments set out in it, is there
3 not?

4 MS. GLENBERG: There is; that's a world
5 history text.

6 THE COURT: It is.

7 MS. GLENBERG: I would argue not relevant
8 on the question of whether in this display the Ten
9 Commandments is properly integrated.

10 THE COURT: You're saying it's okay to
11 talk about it in connection with world history but
12 not as a foundational document of the United States
13 or our Government?

14 MS. GLENBERG: Well, I think it's
15 appropriate in the world history class because it's
16 talking about the development of a civilization and
17 what principles were important. Whereas, first of
18 all, I would like to make clear that I'm not
19 conceding that the textbook, itself, is okay.

20 THE COURT: I was going to ask you that
21 but go ahead.

22 MS. GLENBERG: Whereas, in both the
23 textbook and display, there is no explanation for
24 how the Ten Commandments or the principles in it
25 are relevant.

1 THE COURT: Why wouldn't it be okay in a
2 world history textbook? I think in the Stone
3 opinion they specifically talk about the -- even in
4 Stone they say, you know, we're not going to
5 prohibit the teaching of the Bible or the Ten
6 Commandments under all circumstances.

7 MS. GLENBERG: Oh, I agree with you as to
8 the world history textbook, Your Honor. What I
9 find is not okay is where the American history page
10 would be from the Roots of Democracy. Again, I
11 said this in our brief, but we object to the
12 inclusion of all those world history texts which we
13 did not get until we got the brief.

14 THE COURT: Well, okay, you object to some
15 things and they object to some things, but I will
16 sort that out. But go ahead.

17 MS. GLENBERG: The question is whether the
18 facts of these elements as represented in the
19 textbook means that it's okay to post them on the
20 wall. There are several problems with the
21 proposition that you just transfer the things in
22 the textbook onto the wall. First of all, that
23 isn't actually what happened here because the Roots
24 of Democracy display talks about enlightenment
25 thinkers and their influence. It talks about

1 Greco-Roman history and its influence.

2 THE COURT: That's the Roots of Democracy
3 from the page in the textbook.

4 MS. GLENBERG: Yes, and that is the only
5 example from the curriculum or the Standards of
6 Learning that they have of the Ten Commandments
7 being mentioned in connection with American
8 history.

9 So it's just -- it's odd that the SOLS
10 mention a variety of influences on American
11 inspired and American government and exclude the
12 Ten Commandments. It's odd --

13 THE COURT: Well, they don't exclude it,
14 it's just not there. They don't say these are the
15 foundations of American government and the Ten
16 Commandments are not foundations of American
17 government. It's just not listed in any American
18 government or civics SOLS. It's just not there.

19 MS. GLENBERG: It's not there and my point
20 is, I think the list is comprehensive and it's not
21 there. So just as it's odd to claim that this is
22 tied to the SOLS when the display does not have
23 anything related to Montesquieu or Black or the
24 Roman or Athenian democracy. It's odd that they
25 would claim this textbook page as their link to the

1 curriculum without any representation of those
2 other major influences on American thought.

3 THE COURT: It's also odd to me that the
4 reference, the explanation accompanying the Ten
5 Commandments, in this case, provide the moral
6 background for the Declaration of Independence and
7 the foundation of our tradition. It's odd to me
8 that that, as in this case, that position was
9 abandoned by the counties in McCreary. The
10 McCreary court decided by the Supreme Court, at
11 footnote 21, the county abandoned their claim that
12 the Ten Commandments provided the moral background
13 for the Declaration of Independence, yet they're
14 asserting that in this case.

15 MS. GLENBERG: They are asserting that.
16 In fact, the entire display is reflective of the
17 McCreary display which the Supreme Court --

18 THE COURT: The third McCreary display.

19 MS. GLENBERG: Correct, Your Honor.

20 THE COURT: Do you think the fourth
21 display in this case, and I'm going to call it
22 Pastor Wilburn's display, the one that was put up
23 in January of 2012. Do you think that display is
24 more troubling from a religious perspective than
25 the display that was approved on June 7, 2011,

1 because it presents more of a Christian viewpoint
2 than the one that was approved on June 7, 2011?

3 MS. GLENBERG: Yeah, I think that's a
4 difficult question to answer because it does have
5 more documents that consistently display the
6 Christian viewpoint. At the same time it doesn't
7 have a document like the Ten Commandments that is
8 expressly a religious document.

9 THE COURT: The explanation of Thomas
10 Jefferson's view in Pastor Wilburn's 2012 display
11 presents a particular viewpoint about Thomas
12 Jefferson, yet fails to mention that he had his own
13 Bible in which he excerpted parts, parts that he
14 didn't like. There is no reference to the
15 Jefferson Bible in there. But yet it tends to
16 present a particular viewpoint that Jefferson
17 really didn't believe in separation of church and
18 state.

19 Do you think that under Rosenburger that
20 is impermissible viewpoint discrimination that the
21 2012 display and the viewpoint that's presented
22 about Jefferson?

23 MS. GLENBERG: Well, I don't know that I
24 can say that it's viewpoint discrimination unless
25 someone tried to present an alternate view and was

1 rejected. I think that because the school board
2 has the ultimate and unlimited authority to decide
3 which historical documents are included, that the
4 potential for viewpoint discrimination is certainly
5 there and that's all that's required to say that
6 something is not a public forum. A public forum
7 must have clear standards and unlimited discretion.

8 THE COURT: Do you think it's appropriate
9 for the school board of Giles County to approve
10 willy-nilly whatever Pastor Wilburn wants to put on
11 the walls of Giles County?

12 In 2012 he proposes 18 documents that are
13 edited by counsel for the defendants in this case,
14 and they go up on the wall; no discussion, just put
15 up there. Do you think that's exercising their
16 constitutional obligation to support and defend the
17 Constitution by putting up on the wall whatever
18 Pastor Wilburn wants?

19 MS. GLENBERG: I think that they are
20 abandoning that obligation by putting up a set of
21 documents that have as their common thread this
22 Christian viewpoint and displays a document that
23 has this viewpoint about Thomas Jefferson that's
24 intended to justify the endorsement of religion by
25 the school.

1 I think that it certainly contributes to
2 the idea that improper purpose that Pastor Wilburn
3 donated the first display, they put it up without a
4 problem, he donated the last display, they put it
5 up without a problem. I don't know if that by
6 itself is an abandonment of their constitutional
7 obligation.

8 THE COURT: It's just a question. Like I
9 said, I have lots of questions. But I want to get
10 back to the other question, because I led you down
11 a path. I don't want you to loose the train of
12 your argument. You were talking about integration
13 with curriculum. Their argument is that this
14 display in this public school is okay under Stone
15 and under McCreary and under Lemon because it's
16 integrated with the curriculum, and I asked you the
17 question about, look, it's in the textbook and
18 therefore why is it any different. You were, I
19 think you were there before I asked you some other
20 questions. So I think that's an important point.

21 MS. GLENBERG: Yes. So first there were a
22 couple of observations about the process of
23 translation, if you will, between that book and the
24 display. One of them being the omission of other
25 significant influences on American thought. The

1 other --

2 THE COURT: Athenian Democracy,
3 Greco-Roman history and that kind of stuff.

4 MS. GLENBERG: If it's the case that the
5 school board can simply take what's written in the
6 textbook and plant it on the wall, that textbook on
7 that same page also talks about the influence of
8 the teaching of Jesus on American government.
9 Again, with no explanation as to what that
10 influence is. But the suggestion, I think it would
11 follow, that they could have included, instead of
12 the Ten Commandments, a cross. Or, they could have
13 put up a display of a picture of Jesus along with
14 Patrick Henry and Washington and Jefferson and
15 Madison. I think that that highlights the way in
16 which putting something on the wall endorses it in
17 a way that the textbook, at least my explanation,
18 does not.

19 THE COURT: Do you think it's different
20 putting it on the wall of the hallway of the school
21 versus on the wall of a classroom?

22 MS. GLENBERG: I do not think that's
23 different.

24 THE COURT: You don't think there is any
25 difference there. But you do think there is a

1 difference in terms of endorsement between putting
2 it on the wall of the school and just having it as
3 mentioned in a textbook?

4 MS. GLENBERG: Yes. Again, Your Honor, I
5 do want to make clear that I'm not conceding the
6 propriety of that page in the textbook. Again, I
7 don't know that the integration there where there
8 is no explanation of why the Ten Commandments are
9 the teachings of Jesus are relevant to American
10 thought.

11 Here is where a textbook is different from
12 the wall. When a teacher is teaching from a
13 textbook, a teacher can provide that context and
14 make clear that the Ten Commandments are being
15 mentioned in context, explain what the relevance is
16 of the Ten Commandments and insure that it's taught
17 in a neutral fashion so there is not any mistake
18 about whether the school is endorsing the Ten
19 Commandments, itself.

20 Whereas as on the wall, it's devoid of
21 that context. Furthermore, Stone I think
22 explicitly draws a distinction between the
23 curriculum and the wall and the quote is: This is
24 not a case in which the Ten Commandments are
25 integrated into the school curriculum or the Bible

1 being constitutionally to use in an inappropriate
2 study of history, civilization, ethics, comparative
3 religion or the like. Posting a religious text on
4 the wall serves no such educational function.

5 I think that is significant because
6 posting documents on the wall without a teacher to
7 provide the context, without an explanation, except
8 for the one that was sort of poked fun of by the
9 Supreme Court and abandoned by McCreary, the
10 message that it sends is, we, the school think
11 these are important documents.

12 THE COURT: Well, are there any
13 circumstances in which the posting of the Ten
14 Commandments in a public school would be
15 constitutionally permissible?

16 MS. GLENBERG: I think that the context
17 would have to be absolutely clear. So, perhaps, if
18 the Ten Commandments were posted and a display that
19 says significant developments in the history of
20 religion and provided a number of documents from a
21 number of religions and said here is the
22 significance of each one. Or, if the Ten
23 Commandments have some relationship to the
24 Constitution or the Declaration of Independence,
25 which we don't see. If that influence were made

1 explicit along with all of those other influences
2 deemed significant by the SOLS and the title was
3 Significant Influences on American Thought and
4 there is an arrow from the Ten Commandments to
5 whatever document it influenced, say, the Ten
6 Commandments was significant to the thought behind
7 this document because. What was significant to the
8 Declaration of Independence.

9 THE COURT: Would you find it
10 unconstitutional if the school board posted the
11 page from the textbook called the Roots of
12 Democracy textbook?

13 MS. GLENBERG: I would for two reasons.

14 THE COURT: The textbook adds some of the
15 things you are saying as missing. It adds Athenian
16 Democracy, Greco-Roman influences. It adds some
17 other influences. What is wrong with that page, if
18 they put that page up there?

19 MS. GLENBERG: It doesn't explain why the
20 Ten Commandments or Christian thought is
21 significant to American history. That's why I
22 question the page as a whole.

23 THE COURT: There have been a number of
24 courts following McCreary which have allowed the
25 foundations display to be posted and have held

1 those to be constitutional. Foundations display
2 similar to the display approved by the school board
3 on June 7, 2011.

4 Now, none of those cases, Mercer, and the
5 others, none of those cases involve public schools.
6 They involve other public buildings, courthouses,
7 principally courthouses. Why should the Court
8 recognize a distinction there between a public
9 school and a public building, such as a courthouse,
10 or in the case of VanOrden the Texas state house
11 grounds that was decided the same day as McCreary.
12 There is language in McCreary that talks about,
13 look, the same display are not to be held
14 unconstitutional by one court and constitutional by
15 another. Generally without more, the language is,
16 without more it should be the same. So the
17 question is: Why are public schools different, if
18 you believe they are?

19 MS. GLENBERG: The difference is -- there
20 are several differences. There is the
21 impressionability of children and the likelihood
22 that they will perceive a document on the wall as
23 an endorsement of that document. There is the
24 degree of influence that a school has over its
25 students that make students both feel they should

1 adopt the positions of the school and that they
2 shouldn't complain about them. There is the fact
3 that --

4 THE COURT: Could Giles County name its
5 mascot, its football team, the fighting
6 commandments and put little things on their
7 football helmets?

8 MS. GLENBERG: I don't think so. I think
9 that would be a pretty explicit endorsement of
10 religion.

11 THE COURT: If this happened in the Giles
12 County courthouse instead of the Giles County
13 public schools, same history, but it's in the
14 courthouse instead of the public schools, would you
15 view there to be a difference of constitutional
16 dimension here?

17 MS. GLENBERG: I think that it would be a
18 harder case but still --

19 THE COURT: A harder case for you?

20 MS. GLENBERG: Yes, exactly. Because the
21 history is significant. The fact that we started
22 with a display of the Ten Commandments with only
23 the Constitution. That's one reason. Another
24 reason is if you include the expressed perceptions
25 of the community and the history of that was all

1 the same, too, I think that adds a great deal of
2 evidence that the effect is religious. Finally --

3 THE COURT: The second prong.

4 MS. GLENBERG: Yes.

5 THE COURT: Effect/endorsement.

6 MS. GLENBERG: Effect/endorsement. I
7 think that's also relevant as to the purpose but
8 especially as to the effect. If that evidence were
9 still in place, then I think that would show a
10 religious effect.

11 THE COURT: So you think even if this had
12 happened in the circuit court for Giles County that
13 you believe it would be also unconstitutional, the
14 same instrument?

15 MS. GLENBERG: I do and for one additional
16 reason, as well. Because, again, in McCreary the
17 court in looking at the almost identical display
18 said that there was no coherent theme, that it
19 would be baffling to a reasonable observer, that a
20 reasonable observer would throw up their hands and
21 conclude that this was just a way to continue
22 posting the Ten Commandments.

23 THE COURT: But the Court in Mercer
24 allowed it after that.

25 MS. GLENBERG: I think --

1 THE COURT: It was the same display.

2 MS. GLENBERG: I think that there are
3 several distinguishing factors in Mercer besides
4 the public school context. First of all, I think
5 that Mercer and Grayson were incorrectly decided in
6 light of that very clear language from the Supreme
7 Court, which they basically ignored. Interestingly
8 there is dissent in Mercer that says that exact
9 same thing. Five judges said that, look, the panel
10 just ignored the clear language and ignored what
11 the Supreme Court had to say about the meaning or
12 lack thereof of these displays. So that's one
13 thing.

14 But as to distinguishing Mercer and
15 Grayson, in addition to the public school context
16 there is the expressed absence of any history like
17 we have here where we start with the
18 unconstitutional display and I can get into that
19 also.

20 THE COURT: Why do you think that the --
21 Giles County argues a lot that this case is
22 distinguishable from McCreary because McCreary
23 started with a stand alone display just the Ten
24 Commandments. This case is distinguishable because
25 there was always another document with the Ten

1 Commandments. For example, in this case for a
2 number of years there was the Constitution. So
3 does that make a difference?

4 MS. GLENBERG: It does not, Your Honor,
5 because I would argue that although that certainly
6 makes this display different --

7 THE COURT: Well, Mercer said whatever is
8 left of Stone is limited to circumstances involving
9 public displays of the Ten Commandments in
10 isolation. That's what the panel said in Mercer.
11 So is it okay to put the Ten Commandments up? If
12 it's not okay to put the Ten Commandments up on the
13 wall of a school by, itself, that's clear. Stone
14 says you can't do it. So putting it up with the
15 Constitution, does that change the calculus?

16 MS. GLENBERG: The answer is that it does
17 not change the calculus for several reasons. One,
18 as the Court said in McCreary, Stone stressed the
19 importance of integrating the commandments into
20 secular scheme. And, if as I argued, the revised
21 display didn't do that, this display certainly
22 doesn't. There is no reference to any part of the
23 curriculum. There is no expression of any kind of
24 theme or any reason for putting these two documents
25 together. So the addition of the Constitution does

1 not in anyway obviate the religious purpose or
2 effect.

3 THE COURT: What about the -- I think it
4 was the Seventh Circuit in Ashbook that talks
5 about, and I may have my circuits mixed up because
6 it's one of those states, Indiana, but what about
7 the fact that in that case the court actually had
8 some trouble. In fact, great trouble with the fact
9 that the Ten Commandments were put up. It was in
10 Judge DeWeese's courtroom. He had on one side of
11 the wall the Bill of Rights and on the other wall
12 he had the Ten Commandments. They said, look, you
13 can't do it because it's equating and sort of
14 giving more -- it's building up the Ten
15 Commandments because it's equated to the Bill of
16 Rights. It's putting an equipoise and therefore
17 it's a bigger constitutional problem or at least as
18 significant a constitutional problem as putting it
19 by itself. There is that argument as well, is
20 there not?

21 MS. GLENBERG: Absolutely, Your Honor.
22 And not only in that Ashbrook case but also the
23 O'Bannon case that was the one out of Indiana but
24 it involved --

25 THE COURT: O'Bannon was a monument case.

1 MS. GLENBERG: But it made the same point
2 about a monument that had on one face the Ten
3 Commandments and other face was a secular document.

4 THE COURT: But I think Books v. Elkhart
5 has the same issue. That was an eagle on the
6 monument. So it's O'Bannon and Ashbook.

7 MS. GLENBERG: Both of them made that same
8 point, that putting the two in equipoise, as you
9 say, puts them on a par with each other and
10 suggests that religion is linked to our government.
11 Suggests that that link is a good thing. Suggests
12 that the government holds both these documents in
13 equal importance and in the same way. So, yes,
14 that is certainly another problem with the original
15 display.

16 The other problem is, Stone said that the
17 other statement about the effect is anything it
18 would be to read and revere and venerate the Ten
19 Commandments. How does adding the Constitution
20 change that? It adds another document that can be
21 read, revered and venerated and that's a
22 permissible objective with respect to the
23 Constitution. It is not with respect to the Ten
24 Commandments. I don't know how adding the
25 Constitution makes that calculus any different as

1 to how students are going to react to seeing the
2 Ten Commandments. If anything, they are going to
3 read and perhaps take on those calculuses,
4 themselves.

5 THE COURT: Under Learner you, as the
6 plaintiff, have the burden to demonstrate that the
7 display is unconstitutional, right?

8 MS. GLENBERG: Yes, Your Honor.

9 THE COURT: Now, as to prong one, what is
10 your burden? Must you show that there is no
11 secular purpose or do you have to show that the
12 purpose is predominately religious or are they
13 pretty much the same thing?

14 MS. GLENBERG: I think they are not the
15 same thing. I think that prior to McCreary, at
16 least, there was this notion that any secular
17 purpose would do. But McCreary made it clear that
18 the religious purpose could not predominate over
19 the secular purpose. If the religious purpose
20 predominates, then that's still unconstitutional.

21 THE COURT: Don't we have to give some
22 deference to the board's resolution in this case?
23 Do we have to give some deference to the fact that
24 the purpose for the June 7th display is as they say
25 it is?

1 MS. GLENBERG: Well, several things about
2 that, Your Honor. First of all, yes, a certain
3 degree of deference is always appropriate to a
4 state of legislative purpose.

5 However, in this case, first of all, the
6 purpose as stated in the resolution is somewhat
7 mixed. It states that these are important
8 documents in our history and have educational
9 value. It also says we are interested in
10 implicating moral values and instilling desirable
11 qualities in our students.

12 THE COURT: There is that.

13 MS. GLENBERG: Additionally, then you add
14 into the history which was so dispositive in
15 McCreary and in this case we have not the identical
16 history, I acknowledge, but something very similar
17 where we start with the unconstitutional display
18 where the display is removed because of fear of
19 litigation and the school board then finds
20 something to replace it. I think if you add to
21 that and the fact that it's very clear that the
22 school board was reacting to a context in which
23 people were vigorously expressing religious
24 objections to the removal of the Ten Commandments,
25 I think that adds to the demonstration of purpose.

1 I think that in addition to that --

2 THE COURT: Is there anything in the
3 record, and I am going to ask Mr. Staver this, too,
4 to which you can glean a secular purpose from the
5 board's vote on January 20, 2011, where the motion
6 was to rehang the Ten Commandments and where the
7 community who was there was thanked for their
8 support of the Ten Commandments? Is there anything
9 there from which you can glean any secular purpose?

10 MS. GLENBERG: Are you talking about
11 January 20th?

12 THE COURT: Yes.

13 MS. GLENBERG: No, there is no clear
14 secular purpose expressed by any member of the
15 board. The vote came not because it was on the
16 agenda but in direct response to all of these
17 citizens speaking for religious reasons. I think
18 that even if you believed that the original purpose
19 for hanging that original display was secular,
20 which I don't believe, but if you believe that,
21 nonetheless, the rehang of the Ten Commandments
22 was taken with no evidence of a secular purpose.

23 THE COURT: All right. Let me ask you
24 this question then and this is where I see the
25 issue in this case and that is in the history,

1 because McCreary says you've got to look at
2 history. You've got to consider whether it's a
3 shame or whether or not it's a true secular
4 purpose.

5 In this case we have four displays. We
6 have the 1999 to December 2010, Pastor Wilburn and
7 the Ten Commandments and the display he put up and
8 the Constitution. That's in all the Giles County
9 schools. It comes down. Superintendant Arbogast
10 takes it down, advises the board. The board takes
11 no action in December. January 20th, it's not on
12 the agenda and there's a public outcry and the
13 minutes reflect nothing but religious reasons for
14 putting the Ten Commandments back up. There is no
15 mention of SOLS, no mention of curriculum, no
16 nothing, and they vote to rehang the Ten
17 Commandments. Okay.

18 If you assume from that, that the Court
19 finds that there is a predominately religious
20 purpose to the vote to rehang the Ten Commandments
21 on January 20th, does that mean that from thence
22 forward as the events rolled out in the spring and
23 the Bobby Lilly display is put on the wall later on
24 June 7th, does that mean that that display is
25 tainted as well? Is there a change of a

1 constitutionally significant event that took place?

2 And, you know, it's a tough question
3 because McCreary, itself, says -- so the question
4 is: Let's assume for the sake of argument that the
5 Court finds that what happened before December the
6 hanging of the Ten Commandments and the
7 Constitution has no secular purpose, and I'm not
8 saying how I'm going to rule this case but let's
9 just assume for the sake of argument, and then the
10 vote on January 20th the evidence is there is no
11 secular purpose. What about what happens after
12 that?

13 If all you have was the evidence beginning
14 on February 15th when Bobby Lilly first comes to
15 the board, and you exclude everything that goes
16 before that, is this display constitutional? In
17 other words, if Bobby Lilly comes up and the very
18 first time starts talking about SOLS and curriculum
19 and that's in the board minutes, does that raise
20 any constitutional concern? And can the Court in
21 this case parcel it into two separate events or is
22 it all so much together that I can't do that?

23 MS. GLENBERG: First of all, I think it's
24 one big sequence of events. And I think that the
25 record is clear that it was because the original

1 display was taken down that this new display was
2 considered and approved.

3 THE COURT: In fact, the Bobby Lilly
4 display was first discussed a week before the Ten
5 Commandments display was taken down. The vote was
6 to take it down. Bobby Lilly first approached the
7 board on February 15th and the board met on
8 February 22nd and voted to take it down, right?

9 MS. GLENBERG: That's correct; although,
10 it was before it was taken down, it was after the
11 public controversy had erupted over the first
12 removal of the Ten Commandments and Bobby Lilly
13 said, you know, I've been following these
14 discussions, I am interested in this controversy,
15 so I have come up with this proposal. And after
16 the display was taken down, the original display
17 was taken down permanently that's when you get the
18 support for Bobby Lilly's proposal.

19 THE COURT: But if we just had the
20 foundations display posting in the public school
21 with these other historical documents, and you
22 don't have the history that goes before, given
23 Mercer and these other cases, would that display be
24 constitutional?

25 MS. GLENBERG: Well in your hypothetical,

1 Your Honor, is there the degree of public
2 expression as to the perception of the purpose that
3 we have here? In other words, when Bobby Lilly --

4 THE COURT: You exclude that everything
5 that happens before February 15, 2011, and you go
6 forward. Is that constitutional or not?

7 MS. GLENBERG: It's not, Your Honor
8 because --

9 THE COURT: Why? Mercer said it would be.

10 MS. GLENBERG: Again, I disagree with
11 Mercer and it's distinguishable.

12 THE COURT: That's a courthouse not a
13 school.

14 MS. GLENBERG: Yes. And it upheld that
15 display despite the clear language of the Supreme
16 Court about how that display made no sense
17 whatsoever.

18 THE COURT: So you think Mercer and
19 Grayson County were wrong?

20 MS. GLENBERG: I think they were wrong and
21 distinguishable. Additionally --

22 THE COURT: I want to know what the
23 constitutional problem with the foundations display
24 is, if you have no history before February 15th.

25 MS. GLENBERG: The problem is that the Ten

1 Commandments sticks out like a sore thumb because
2 there is no plausible explanation for its inclusion
3 in this display.

4 THE COURT: Well, you would agree that the
5 Mercer Court and Grayson Court don't agree with you
6 on that.

7 MS. GLENBERG: I certainly agree with
8 that. And certainly, if you take the Mercer and
9 Grayson Court at their word, then without the
10 history it's a closer question but there is still
11 the school context. And one other piece of
12 evidence that I neglected to mention, as to the
13 content of the display, is that in the text of the
14 Ten Commandments, itself, we don't just have the
15 Ten Commandments but there is a little sort of
16 blurb at the end which says: According to ancient
17 scripture the Hebrews were kept out of Egypt by the
18 Pharaoh and made to wander through the desert in
19 search of the promised land. God spoke to the
20 prophet Moses on Mount Sinai, the Egyptian desert,
21 where he ordered Moses to take His commandments to
22 His people so they could live according to his
23 wishes.

24 These laws form the basis of modern
25 religion. The modern religion of Judaism and

1 Christianity.

2 THE COURT: What's your problem with that?

3 MS. GLENBERG: My problem with that is
4 that it states and assumes as true and endorses a
5 particular reading of the Bible and it has nothing
6 to do with the founding of the United States.

7 THE COURT: All right. Let me ask you
8 this question: So your position is even if the
9 history before February 15th didn't exist, this
10 display, the foundations display with the history
11 that started with Bobby Lilly, is unconstitutional.
12 That's your view because it sticks out like a sore
13 thumb, it's in a school, and you don't like the
14 language at the bottom. Is that fair?

15 MS. GLENBERG: That's fair.

16 THE COURT: Now, let me ask you this:
17 There is no dispute, although, Giles wants to
18 exclude evidence of purpose from deposition
19 testimony, things like that. Later on, Giles wants
20 the Court to consider what Pastor Wilburn says the
21 purpose was and what Mr. McCracken said the purpose
22 was back to 1999 when these display were put up.
23 So they are a little talking out of both sides
24 their mouth, but we'll get to that in a minute.

25 Let's accept Pastor Wilburn at his word

1 and let's accept Mr. McCracken at his word; and
2 that is, the reason why we put up the Ten
3 Commandments is because of Columbine and because of
4 the shootings in Columbine we didn't want that to
5 happen in Giles County. Now, given Pastor
6 Wilburn's concern in 1999 over the Columbine
7 shootings, would the posting of just the last six
8 commandments reflect a secular purpose and be
9 constitutional?

10 MS. GLENBERG: Well, it's harder and
11 closer, but I think it would still be
12 unconstitutional because what you're posting is not
13 just the direction people shouldn't kill and
14 shouldn't steal.

15 THE COURT: Nothing about God in thou
16 shalt not kill and steal and honor thy father and
17 mother and the last six deal with -- it's the first
18 four that mentions God.

19 MS. GLENBERG: It is the first four that
20 mention God.

21 THE COURT: The first four is where your
22 big problem is.

23 MS. GLENBERG: Yes.

24 THE COURT: Right.

25 MS. GLENBERG: I would say --

1 THE COURT: What if Giles County today
2 decided to avoid all of this mess and just say from
3 the Ten Commandments posted the last six? Wouldn't
4 that eliminate all this turmoil, because, I mean,
5 there is nothing wrong with putting something on a
6 school wall saying thou shalt not kill, is there?

7 MS. GLENBERG: The thou shalt not --

8 THE COURT: We don't want kids killing.

9 MS. GLENBERG: But the thou shalt not
10 implies the direction from the Devine being.
11 That's why I say don't kill is fine. Thou shalt
12 not kill, which everyone knows is from the Ten
13 Commandments, is not fine. However, Your Honor, I
14 take your point and I think that obviously it's
15 much more problematic with those first four.

16 THE COURT: And maybe it was the Supreme
17 Court decision that it talked about the Ten
18 Commandments, have talked about the fact that first
19 four and the second six are different.

20 MS. GLENBERG: Yes, Your Honor.

21 THE COURT: They do it in this context.
22 There is no secular basis or moral code for the
23 first four. It's the Divinity of God and
24 recognition of God. It's the second six where you
25 want Kindergartners to see thou shalt not kill,

1 don't lie, don't steal, honor your mom and dad;
2 those kinds of things. I just wonder, really, in
3 this room if there is some common ground on the
4 second six. If Giles County decided to change
5 their display a little bit, we could resolve this
6 matter without -- I understand the ACLU has a
7 point of view and Mr. Staver and Liberty Counsel
8 have a point of view, but Giles County has an
9 obligation to the citizens of Giles County. If you
10 win this case, you're going to ask for hundreds of
11 thousands of dollars in attorneys fees, right?

12 MS. GLENBERG: I would think so, Your
13 Honor.

14 THE COURT: Right. The Court has the
15 discretion to award it. So why wouldn't it make
16 sense if, indeed, the issue is not about God; if,
17 indeed, the issue is secular and historical; and,
18 indeed, the issue is about preventing shootings
19 like Columbine, why wouldn't it make sense for
20 Giles County to say let's go back and we'll just
21 post the bottom six. These are excerpted from the
22 Ten Commandments. And won't that go a long way
23 toward settling this huge community dispute and
24 resolving the uproar, if it's not really about God?
25 But if it's really about God, then they wouldn't be

1 willing to do that. Go ahead.

2 MS. GLENBERG: Well, Your Honor, I'll
3 agree that that's a compromise and one, of course,
4 I would go back to my clients with.

5 THE COURT: I'm not asking that you make
6 that decision today. I have been reading all these
7 cases. There are a million Ten Commandments cases
8 out there, and you've got a point of view and
9 Liberty Counsel has a point of view, but I'm not
10 sure that point of view is in the best interest of
11 Giles County and its citizens. That's not a
12 decision for the Court to make. I can just decide
13 a case that's presented to me constitutional or
14 not. I think the folks who are on the two sides of
15 this case ought to think about whether or not there
16 is a reasonable way to eliminate the risk that
17 Giles County is going to get tagged with a huge
18 attorneys fee and think about resolving this case.

19 All right. I have a few other questions.
20 Now, is the display as it existed on June 7, 2011,
21 or now as it exists, a limited public forum?

22 MS. GLENBERG: No, it's not, Your Honor.
23 And the reason for that is -- there are several
24 reasons. First of all, in a limited public forum,
25 the government does not decide what the first group

1 of documents is going to be in the forum. They
2 don't say we are having a limited public forum and
3 it's going to consist of these documents and that's
4 what the resolution expressly says that the display
5 will initially include, shall include, additionally
6 the following document, shall include a brief
7 explanatory document.

8 THE COURT: In those cases where the
9 government holds the ability to say yea or nay and
10 where the government doesn't set out any criteria,
11 it just, I mean, right now it's in the unfettered
12 discretion of Giles County school board as to what
13 goes on the wall. Is that a square peg in the
14 round hole of the limited public forum cases? All
15 those cases came up in the context of free
16 expression but the Establishment Clause has
17 (inaudible) as well.

18 MS. GLENBERG: Yes, Your Honor. And Your
19 Honor, an unfettered discretion is inconsistent
20 with either a traditional public forum or a limited
21 public forum. The Supreme Court made it clear in
22 cases like the Forsyth Nazi case that you can't
23 have unfettered discretion over public forum. The
24 Fourth Circuit has said we used the same rules in a
25 limited public forum as to discretion.

1 So, yes, it's inconsistent for the school
2 board to hold that authority and call it a limited
3 public forum.

4 THE COURT: Does a Lemon Test in the
5 holding of McCreary allow me to find that the
6 purpose changed after February 15, 2011 and that a
7 display as to which the original purpose was
8 religious and therefore unconstitutional can later
9 become secular and constitutional based on the
10 evidence in this case?

11 MS. GLENBERG: Not based on the evidence
12 in this case, Your Honor. I would say that given
13 McCreary's language that perhaps the taint doesn't
14 last forever. There are cases where you might find
15 a later display to be constitutional. The history
16 is close enough in McCreary that it shows the
17 religious purpose.

18 THE COURT: In McCreary there were
19 comments made by the judge executor, there was a
20 pastor and there was a ceremony at the beginning of
21 McCreary. That's different from this case.

22 MS. GLENBERG: It's different. Those are
23 not elements that the court strongly relied on in
24 McCreary. The court also did not say this is the
25 minimum amount of history that you need.

1 Did you have more questions, Your Honor?

2 THE COURT: I think you've exhausted my
3 questions.

4 MS. GLENBERG: Then there are a few things
5 that I would just like to touch on. I think we
6 talked pretty comprehensively about purpose, but I
7 think it's important not to neglect the effect/
8 endorsement prong. Many of the pieces of evidence
9 that we talked about overlap as to purpose and
10 effect. The reasonable observer would observe all
11 of this history and observe the lack of a secular
12 purpose of the original display and the fact that
13 this new display simply was intended to replace the
14 old one. They would observe the lack of a cohesive
15 message in the display as a whole.

16 But in addition, the effect prong or
17 endorsement prong is where the evidence about the
18 community's responsive controversy really comes to
19 the floor. The speakers at the board meeting on
20 January 20th, they were expressing their perception
21 of what that original display meant. The people
22 who were wearing Ten Commandment T-shirts to the
23 May 19th meeting where Bob Lilly presented his
24 documents were expressing what they thought that
25 display was about.

1 The letters to the editor in which the
2 vast majority of writers appear to view the
3 controversy in a religious light, whether they
4 supported it this way or not is, again, a direct
5 expression, direct evidence, of how this community
6 views the display. Same with the lawn signs and
7 car magnets, with additional people that Pastor
8 Creger said joined his church as a result of this
9 controversy.

10 All the evidence is that the community
11 perceived this as an endorsement of religion. All
12 of those pieces of evidence, the comments of the
13 speakers, T-shirts, lawn signs, etcetera, not only
14 are direct evidence of the perception of the
15 community, they also circle back and contribute to
16 the perception of the community. So that
17 reasonable observer who didn't write a letter to
18 the editor is observing all of these lawn signs,
19 and observing the letters to the editor, and
20 observing, at least, of a walkout at Giles high
21 school and the subsequent rally. The evidence as
22 to effect, I would argue, is overwhelming.

23 I also wanted to make sure I address a few
24 other issues as to the public forum. One of the
25 things that has been claimed is that the school has

1 always had a public forum and it was just more
2 closely defined by this resolution. As I said, I
3 don't think the resolution, itself, creates a
4 public forum. I also don't think there was any
5 forum to begin with. The evidence that's relied on
6 for the forum is that Doctor McCracken, the former
7 superintendent, said quote: Tons of community
8 things are posted in the schools on a regular
9 basis.

10 That statement just is not evidence of the
11 existence of a public forum. Because in order to
12 analyze a forum, you need to know what the
13 parameters are. What parts of the school are the
14 forum. What topics is it limited to. And most
15 importantly, do people have to go through some sort
16 of review before posting the documents and does
17 that review consist of neutral criteria.

18 So just saying tons of community things
19 are posted at the school on a regular basis, is
20 perfectly consistent with there being no public
21 forum where the principal or the superintendent has
22 complete discretion to decide what things will be
23 posted and what will not.

24 THE COURT: So you would, based on what
25 you're telling me, if Giles County decided they

1 wanted to move this Ten Commandments over to
2 another display that says history of world
3 religions, you wouldn't have any problem with that
4 and had some references to other world religions?

5 MS. GLENBERG: As long as the context was
6 clear. As long as it was clear that we are looking
7 at the Ten Commandments as its role in this larger
8 picture.

9 THE COURT: Even though it was on the
10 wall?

11 MS. GLENBERG: Yes, I think even though it
12 was on the wall.

13 THE COURT: All right. They can put the
14 Ten Commandments on the wall. They just have to do
15 it in a different context, is what you're saying?

16 MS. GLENBERG: Yes, Your Honor, in a
17 context where the purpose of the Ten Commandments
18 is apparent and it's apparent that it's a secular
19 purpose. So for example, if you put up the Ten
20 Commandments along with Theorem and E equals MC
21 squared, that doesn't change the religious affect
22 of the Ten Commandments.

23 THE COURT: But if you put it up there
24 with maybe something from Mohammed or something
25 from Confucius or Buddha or something like that,

1 world religions, they can do that?

2 MS. GLENBERG: I think they could do that,
3 Your Honor. I would like to see in addition a
4 disclaimer that the school doesn't endorse any of
5 the beliefs that are on the wall, but I think they
6 probably could do that.

7 THE COURT: A disclaimer like there was in
8 the Fourth Circuit Bible case the Peck v. Upshur
9 case.

10 MS. GLENBERG: Precisely, Your Honor, and
11 that was the other thing I wanted to mention about
12 public form and the private/public speech. In all
13 of those forum cases that were cited, there were
14 additional indicia of private speech as opposed to
15 government speech. None of them involved a
16 permanent display or activity at the school. The
17 clubs were meeting after school hours. The Bible
18 distribution had the disclaimer and it was only one
19 day out of the year. For all of these factors, it
20 made it very difficult to view this private
21 activity as an endorsement of religion. Where
22 there is nothing like that in this case that would
23 say to a person just looking at the display, oh,
24 that's private speech. The government isn't
25 endorsing this thing they put on the wall.

1 THE COURT: If you put a display that says
2 history of world religions and you have Buddha and
3 all this stuff, would that be an endorsement of
4 religion over non-religion? Would that be
5 unconstitutional for that reason?

6 MS. GLENBERG: I think that's why I would
7 be more comfortable with a disclaimer. I think
8 that it's possible to acknowledge the importance of
9 religion in the history of the world without it
10 being an Establishment Clause problem.

11 Your Honor, I think those are all the
12 points that I wanted to address.

13 THE COURT: We'll ask Mr. Staver to make
14 his argument and then I'll give you a chance to add
15 anything afterwards. Mr. Staver, good afternoon.

16 MR. STAVER: Good afternoon, Your Honor.
17 I was going to have Steve Crampton address any
18 history regarding the evidence before you. I can
19 go ahead and begin, and if you have any questions
20 regarding the motions to strike he will address
21 those aspects, whatever the Court's pleasure;
22 otherwise, I can go ahead and begin.

23 THE COURT: I'm flexible. However you
24 want to do it.

25 MR. STAVER: I might just say at the very

1 end for him to do that.

2 THE COURT: That would be fine.

3 MR. STAVER: Thank you, Your Honor. This
4 issue is one I think that this Court already
5 recognized specifically driven or specifically
6 controlled by the facts. While there is no case
7 that deals with the Ten Commandments display in a
8 public school that's been upheld, there has been
9 very few --

10 THE COURT: Shouldn't we just stop right
11 there. Shouldn't the Court just say, look, Stone
12 says you can't do it, McCreary and all its progeny
13 are courthouse cases. Public schools are
14 different, therefore, we should just stop right
15 there.

16 MR. STAVER: No, Your Honor, because if we
17 take Stone seriously, and certainly we do, it says
18 also that there could be the integration of the Ten
19 Commandments in the curriculum.

20 THE COURT: Is there any integration of
21 the Ten Commandments prior to the Bobby Lilly
22 discussion on February 15, 2011? Where is the
23 evidence?

24 MR. STAVER: The evidence is in both the
25 SOLS as well as the curriculum.

1 THE COURT: No mention of the SOLS in the
2 minutes.

3 MR. STAVER: There is not a mention of the
4 Ten Commandments but there is the mention of the
5 Hebrews and history of Judaism and certainly any
6 discussion of Hebrews and the development of
7 Judaism, whether in world religions or world
8 history or other places wouldn't necessarily have
9 to include the Ten Commandments.

10 THE COURT: Is there any discussion in the
11 board minutes or any discussion in what Pastor
12 Wilburn and Doctor McCracken did before February 15,
13 2011 of SOLS or curriculum in the board's minutes?

14 There isn't any, is there?

15 MR. STAVER: There is in the January
16 hearing.

17 THE COURT: January 20th, there is nothing
18 in there about curriculum.

19 MR. STAVER: There is with Mr. Wilburn.
20 He's not obviously a board member but he brought up
21 the SOLS and curriculum that go back all the way to
22 the original display. Since he was part of that
23 discussion with former Superintendent McCracken in
24 the January 15th hearing where the vote was to put
25 the --

1 THE COURT: January 20th hearing.

2 MR. STAVER: The vote to put the display
3 back up there's a discussion about midway down
4 where there is a Shahn Wilburn, about midway in
5 that page, where he's discussing the original
6 display and that he and McCracken discuss the SOLS
7 in the curriculum. So it's part of that record
8 that it was before this.

9 THE COURT: I don't see it. I've looked.
10 Maybe I missed it. He talks about calling the
11 Department of Education.

12 MR. STAVER: It -- he's talking about the
13 Department of Education.

14 THE COURT: Right, I see that. It was the
15 guidelines from the Virginia Department of
16 Education and the attorney general. I don't see
17 any reference to SOLS or curriculum.

18 MR. STAVER: Well, calling the Department
19 of Education, if you go back to McCracken, is one
20 of the things that McCracken -- and by the way, as
21 it relates to Wilburn, the Court mentioned that at
22 one time you want to exclude some testimony and at
23 another time you want to rely upon Wilburn. We're
24 not relying upon Wilburn, we're relying upon
25 McCracken. He was the only one, since there was no

1 board resolution or no board vote back in 1999. He
2 put it up himself after consultation with a number
3 of people, Wilburn being one, but also he went to
4 the Virginia Department of Education. He looked at
5 the Virginia attorney general opinion, and he also
6 was looking at the development of the SOLS that
7 were in the process.

8 THE COURT: Nothing in this board minutes
9 before February 15th about the SOLS or curriculum.
10 You just have to admit it because it's not there.

11 MR. STAVER: Not in the board minutes
12 because the only board action regarding that
13 original display was the January 20th display.

14 THE COURT: At which the board voted to
15 rehang the Ten Commandments and the board member
16 said I want to thank the community for supporting
17 the Ten Commandments. Isn't that an endorsement of
18 religion?

19 MR. STAVER: No, it's not, Your Honor.
20 Because, you know, in this discussion that we just
21 looked at with regards to Wilburn, he harkens back
22 to what happened when McCracken originally put them
23 up. That there was discussion with the attorney
24 general and the Department of Education. At this
25 point in time what we have, is we have an 11-year

1 history from 1999 to December of 2010 with
2 absolutely no controversy.

3 THE COURT: You're right about that.

4 MR. STAVER: Doe 1 knows about those Ten
5 Commandments and the Constitution which the
6 Constitution was much larger, the Ten Commandments
7 was below it, and much smaller than the
8 Constitution and doesn't complain to anyone; no
9 friends, not to the parents or to the school.

10 Doe 2, the parent, knows about them going
11 all the way back to 1999-2000. Doesn't complain at
12 all and everything was going on with virtually no
13 one even knowing they exist. Some of the board
14 members don't --

15 THE COURT: That doesn't matter. That
16 doesn't change just because nobody complained.

17 MR. STAVER: I think it goes back to that
18 VanOrden. We don't know what the timeframe is that
19 VanOrden mentions.

20 THE COURT: VanOrden is not a public
21 school. VanOrden is a monument built on the Texas
22 state house grounds along with a bunch of other
23 monuments. It also says this is donated by the
24 Eagles. It doesn't say I've got the stamp of the
25 government on this. I've got Giles County school

1 board putting its stamp on the Ten Commandments.
2 Isn't that an endorsement on religion?

3 MR. STAVER: No, Your Honor, because they
4 are not putting their stamp of approval on the Ten
5 Commandments.

6 THE COURT: They're not? When a board
7 member at a public meeting says: I want to thank
8 you all for supporting the Ten Commandments.
9 That's not an endorsement of religion?

10 MR. STAVER: The deposition testimony
11 doesn't recall that in the minutes.

12 THE COURT: It's in the board minutes.

13 MR. STAVER: What the issue was is if they
14 had taken down the Constitution, they'd be voting
15 on putting the Constitution back up. What happened
16 is after 11 years of controversy --

17 THE COURT: No. Look, here is the issue
18 in this case. It is clear to me, it is clear to
19 me, that the Ten Commandments as put up with the
20 Constitution violates Stone. It is clear to me
21 when the board voted there was only one thing on
22 their mind on January 20th and that was God. That
23 was an endorsement of religion. That's what all
24 the speakers talked about.

25 Here is the issue in this case. Is what

1 happened after that, is what happened after
2 February 15th and the Bobby Lilly display, in the
3 words of the McCreary court, a change of
4 constitutionally significant dimension such that
5 the display that exists there now is
6 constitutional? That's what I'm really interested
7 in, because I think restrained credibility, to
8 argue, before you got in this case, before
9 February 15th, that this was nothing but an
10 endorsement of religion. I can't see it otherwise;
11 that is, the board voting to put back up the Ten
12 Commandments in response to an outcry from the
13 community where it was Ten Commandments, Ten
14 Commandments, Ten Commandments. They voted to put
15 it back up. I'm struggling to see where that's not
16 an endorsement of religion.

17 Where the real rub in this case is the
18 issue, I think, of, okay, can they change? Is
19 there something different that's happened? Is the
20 display that exists now sufficiently different, a
21 constitutionally significant dimension, that it's
22 okay? That's where you can help me because that's
23 where I'm struggling.

24 MR. STAVER: I think --

25 THE COURT: I'm not asking you to

1 discontinue your earlier argument. I'm just
2 telling you what the Court is thinking. You can
3 agree to disagree with me at a higher level.

4 MR. STAVER: The first one is not really
5 challenged anyway. It's the foundations display
6 that came February 15th and after, that's really
7 what was at issue in the complaint. So I think
8 it's a fundamental change and fundamentally
9 different than has gone on before.

10 In that particular hearing before the
11 board, there clearly is the discussion about the
12 SOLS.

13 THE COURT: Starting on February 15th,
14 Bobby Lilly mentions SOLS. I think SOLS and
15 curriculum are mentioned at every other meeting
16 until the June 7th vote.

17 MR. STAVER: They are. Even the chairman
18 of the board, Chair Buckland, mentioned the SOLS,
19 too.

20 THE COURT: But on June 7th Chair Buckland
21 said I never wavered from my vote on January 20th,
22 which one can infer that he is back to voting for
23 God.

24 MR. STAVER: Well, I think what we
25 ultimately have here is from February 15th on a

1 significant change in course.

2 THE COURT: Given McCreary's history, how
3 can I find, you know, Doctor Webb says all these
4 other documents are a smokescreen. Ms. McMahon
5 says at the 6/7/11 meeting that the battle that you
6 have called and referred to as the Ten Commandments
7 has been won. Mr. Gollehon testified that I voted
8 that way because it was the right thing to do as a
9 Christian.

10 Given that evidence, how can the Court
11 find that there is a significant change in
12 constitutionally significant dimension?

13 MR. STAVER: Well, two of those three
14 voted against. They were part of the three to two
15 dissenters. Webb, in his deposition, indicating
16 that he had no information from the board's direct
17 information or statements that it was for religious
18 purposes and board member McMahon also dissented as
19 well. However, what we ultimately have though is
20 from February 15th on is a significant and ongoing
21 discussion regarding the SOLS, regarding the
22 curriculum. And there was a directive or at least
23 a suggestion by the Chair that it ought to be tied,
24 it would be important to tie these to the SOLS into
25 the curriculum.

1 So Lilly looks at both sides of these
2 things. He says it doesn't seem to be -- and he is
3 doing this on his own -- appropriate that you can
4 never have these kinds of displays. It doesn't
5 seem to be appropriate that you can indoctrinate
6 these kinds of displays. So he harkens back to his
7 own history growing up in Virginia and even going
8 to the schools. Then he talks about the SOLS, and
9 he actually does research with members of the bar
10 and even calls the University of Virginia seeking
11 to connect with one of the constitutional law
12 professors and connects with a librarian there, and
13 researches McCreary and he researches the statute
14 in Georgia and he throws out the "In God We Trust"
15 because he thought that crosses the line.

16 THE COURT: That only applies to
17 courthouses at this moment.

18 MR. STAVER: Correct.

19 THE COURT: There is a proposal to change
20 it to all public buildings.

21 MR. STAVER: Yes, I understand. But he is
22 researching all of this and comes to the conclusion
23 as to why he wants to add this particular display,
24 and he looks at the various curriculum and proposes
25 it. In his display the Declaration of Independence

1 is central. That's the central piece. Then he
2 looks at things that went on before and after. So
3 he looks at the Mayflower Complex, the Magna Carta,
4 and Ten Commandments that were before and then
5 after the Statute of Religious Freedom, the
6 Declaration of Rights, the Bills of Rights,
7 etcetera, and then the contemporary manifestations
8 are the Lady Justice, which does harken back to
9 some of the Greco-Roman and is actually in the
10 textbooks and then also the Star Spangled Banner,
11 are some of the principles that are in this
12 display. That's what he ultimately comes back with
13 and ultimately presents those documents, and I
14 think that's the difficulty there because if you
15 look at McCreary the history probably would be
16 rarely repeated because what you have is a stand
17 alone and then there was a suit. What McCreary did
18 is they jumped from the frying pan into the fire.
19 They went with the second display. The second
20 display was specifically excerpted, so only the
21 religious components of the statement, so instead
22 of the Declaration of Independence it's only the --
23 THE COURT: Isn't the second McCreary
24 display more like the fourth Pastor Wilburn display
25 is this case? Where the Pastor Wilburn display,

1 the one from 2012, even expressed more of a
2 viewpoint of separation of church and state, that's
3 different. Don't the 2012 displays have much more
4 of a viewpoint as opposed to some of the things
5 that were proposed by Bobby Lilly?

6 MR. STAVER: I think the reference
7 regarding Jefferson in the separation of church and
8 state presents the issue of Jefferson's view on
9 separation of church and state.

10 THE COURT: Presents one side of the
11 issue. That's Pastor Wilburn and Liberty Counsel's
12 view of Jefferson's view of separation of church
13 and state. For goodness sakes, it's one side.
14 It's just one side.

15 Isn't that more like McCreary, too?

16 MR. STAVER: Yes and no; that display is
17 not presently challenged is my understanding.

18 THE COURT: The last time you were here
19 you were telling me this whole thing is evolving.

20 MR. STAVER: The display with the Ten
21 Commandments in it is at issue before the Court,
22 and I think that from going through the deposition
23 testimony there appears to be no objection to
24 anything other than the one frame which is the Ten
25 Commandments.

1 THE COURT: Do you think that Giles County
2 school board should put up on its wall anything
3 that Pastor Wilburn says is okay because he has got
4 a church that has got 600 or 700 members?

5 MR. STAVER: Certainly not.

6 THE COURT: Isn't that what happened this
7 year?

8 MR. STAVER: The record doesn't really
9 reflect a lot of what happened.

10 THE COURT: You're exactly right. Pastor
11 Wilburn proposes it, runs it by Liberty Counsel,
12 they make some changes, boom, on the wall of the
13 Giles County public school. Is that exercising
14 their constitutional obligation?

15 MR. STAVER: I don't know exactly what the
16 board did in terms of looking at that individually.

17 THE COURT: Did they do any study? Did
18 they commission a study to look at the curriculum,
19 to look at the SOLS to see if these particular
20 documents are focused on that? No. They just did
21 whatever Pastor Wilburn wanted them to.

22 MR. STAVER: Well, I don't think the
23 record reflects that, and I think that these
24 particular board members interestingly have been in
25 this position for a very long time.

1 THE COURT: I know.

2 They have all been there 20 or 30 years.

3 MR. STAVER: I have never seen a board
4 that has this longevity. So they have been through
5 all of the SOLS and development of the SOLS and
6 very familiar with the curriculum that's there.

7 THE COURT: Let me ask you the question
8 again. It goes back to what I'm particularly
9 focused on and that is this: Assume for the sake
10 of argument that, I mean, do you believe that a
11 school board today could, without all this history
12 of having the Ten Commandments up and taking them
13 down and the public outcry and all the statements
14 and billboards and signs on tractor trailers and
15 the T-shirts and school walkouts and all that,
16 could a school board say we want to put up a
17 display of historical documents and look to our
18 history teachers and relate this to the curriculum
19 and SOLS and do a study and come up with a
20 framework and that these documents make sense and
21 are tied into the curriculum and put it up there
22 including the Ten Commandments, if it's done the
23 right way as opposed to responding to a religious
24 fervor? If it's done the right way, do you think
25 it's within the Constitution?

1 MR. STAVER: Yes, I do, Your Honor,
2 because Stone says it can be and there's not any
3 other decision even in McCreary that reiterates
4 some of that language within Stone. In this
5 particular case, Doe 2 does not object to the
6 presentation of the same information in the
7 textbooks. But Doe 2's objection is Doe 2's
8 understanding of the fact that First Amendment
9 cases have not upheld the Ten Commandments on a
10 wall in a school going back to Stone taking it down
11 from the classrooms.

12 Certainly there's no objection by Doe 2 to
13 having it integrated into the curriculum. If it
14 can be integrated into the curriculum, which Stone
15 and others say it can be, there is no reason why
16 you can't manifest that same assemblage of
17 documents on a wall.

18 THE COURT: Is there an argument,
19 therefore, that the Ten Commandments, as part of a
20 historical display, can be put up on a school wall
21 but the history of this case just doesn't allow it
22 to happen in this case, because of the way Giles
23 County went about it, frankly, before you got
24 involved in the case because of the January -- I am
25 just concerned the evidence shows that the

1 January 20th meeting displays no secular purpose.

2 That's what concerns me. I don't see it.

3 So if it's not there, and there's no
4 secular purpose and if the effect is endorsement,
5 it fails under Lemon and then we've got what comes
6 afterwards.

7 I just wanted -- my point to you is:
8 There maybe a way to do it but just not under these
9 facts. I just wonder that out loud. I have got to
10 deal with the facts that are here, and you've got
11 to deal with the facts that are here, too.

12 You look at McCreary and you look at
13 Mercer and you look at McCreary and Grayson County.
14 One time it's okay; one time it's not. What's the
15 difference? The history; the facts. I am just
16 afraid that the history in this case because of the
17 way the Giles County school board went about it by
18 voting on January 20th to put it back up displays a
19 predominantly religious purpose.

20 MR. STAVER: I know we will not agree on
21 this but let me just touch on it a little bit. On
22 the face --

23 THE COURT: I want you to say whatever you
24 want to say. That's a very interesting nuance
25 issue.

1 MR. STAVER: I want to address the areas
2 that this Court has questions on so I don't want to
3 take up the Court's time on what the Court doesn't
4 need.

5 On the January 20th hearing board meeting,
6 I understand it has people coming, no question
7 about it. But that alone can't infer why they did
8 what they did. The record is silent. That's
9 Mercer County. Mercer County said that the record
10 was silent. There was no information as to why it
11 was put up. There is no statements in the record.
12 It was just a vote, put it up. That's goes back to
13 McCreary.

14 THE COURT: Except for this. In Mercer
15 County it was a vote to put up the historical
16 display. On January 20th it was a vote to rehang
17 the Ten Commandments. That's the difference. The
18 other thing that's different, and I think it's
19 really significant from January 20th is the
20 statement by the board member that says: Thank you
21 all for coming and supporting the Ten Commandments.

22 If that isn't an endorsement, then hit me
23 in the head with a two-by-four.

24 MR. STAVER: I think also that was
25 explained by the board member in the deposition

1 because so many people --

2 THE COURT: What the board member said is,
3 it was Drema McMahon, said in her deposition, I
4 think the word thrilled was used. I can't imagine
5 the other members of the board -- she said I don't
6 really remember it because it was while ago, but I
7 can't imagine the other members using the word
8 thrilled. I may have said historical documents. I
9 may have said Ten Commandments but the minutes say
10 Ten Commandments.

11 MR. STAVER: That's correct; the minutes
12 say that but under her oath it doesn't say that.

13 THE COURT: She says she doesn't remember.

14 MR. STAVER: That's correct; but she also
15 says that when there's a lot of people that show
16 up, she and other board members appreciate the fact
17 they are taking an interest in whatever the issue
18 is. When they came to that hearing they didn't
19 know what was going on. They wondered why all
20 these trucks were outside there.

21 THE COURT: If the board on January 20th
22 had done this, instead of voting to rehang the Ten
23 Commandments, if they had said, golly, this is a
24 really touch issue. We need to study this, get
25 with counsel. We'll let you know. Then the very

1 next thing that happens is Bobby Lilly and the
2 foundations display. It's a different case.

3 MR. STAVER: I think it certainly
4 representative of a different set of facts, but I
5 don't think that that difference is significant
6 enough to make what happened and then Bobby Lilly
7 from February 15th on a completely unconstitutional
8 situation.

9 If you go back to McCreary, McCreary says
10 specifically there maybe times, I'm going back to
11 January 20th and Mercer, although a different
12 display, but McCreary said that there maybe times
13 where people, board members, legislatures, actually
14 don't reveal what's on their mind and just the mere
15 silence can ultimately impact. That was actually
16 the situation in Mercer.

17 If you look over at McCreary, the
18 significant difference was that second display and
19 that second display was completely different than
20 Wilburn's 2012 display. The reason that it was
21 completely different is that it had a resolution
22 along with all the excerpts. The resolution spoke
23 about Prince Jesus or King Jesus or something like
24 that.

25 THE COURT: Prince of Ethics.

1 MR. STAVER: Prince of Ethics and it
2 mentioned Jesus Christ. That was part of the Bible
3 and part of an excerpt in Abraham Lincoln's speech,
4 the Declaration of Independence. Everything was
5 excerpted and only the religious quotes were there,
6 and then you have this long resolution about Jesus
7 being the Prince of Ethics.

8 There is no way that that is anywhere
9 similar to the January 20th meeting here. It's
10 significantly different. It was indisputable based
11 upon the face of the documents, itself. Without
12 even psychoanalyzing what was going on in the minds
13 and the reason why they voted one way or another.

14 THE COURT: Well, the Court says you can't
15 psychoanalyze. We can certainly look at their
16 testimony from the framework of the reasonable
17 observer, correct?

18 MR. STAVER: Correct.

19 THE COURT: When the reasonable observer
20 at the June 7th meeting hears Drema McMahon say the
21 battle has been won -- the battle of the Ten
22 Commandments is done and it has won. Doesn't the
23 reasonable observer think this is all about posting
24 the Ten Commandments and not about historical
25 documents?

1 MR. STAVER: I don't think so. The
2 reasonable observer would know she was in the
3 opposition.

4 THE COURT: Even though she's in the
5 opposition she is saying this is about the Ten
6 Commandments.

7 MR. STAVER: The opposition can't
8 ultimately destroy the purpose of the legislative
9 intent or the history of the text because otherwise
10 opposition can always do that.

11 THE COURT: When Mr. Gollehon says I voted
12 for this on June 7th, because I'm a Christian and
13 it was the right thing to do. Mr. Buckland says, I
14 didn't change my mind from January 20th. I never
15 wavered, were his words in his deposition or maybe
16 in the minutes.

17 So, again, given those statements on
18 June 7th, is what happened in between of
19 constitutionally significant change?

20 MR. STAVER: I think it is because the
21 resolution specifically indicates what this
22 particular display is about and that resolution
23 also specifically allows other individuals from the
24 community to come forward and finance privately the
25 display they were voting on or put in other

1 displays that have historical significance.

2 THE COURT: Do you view this display as it
3 exists on June 7, 2011, do you view it as being
4 principally secular and historical?

5 MR. STAVER: Yes.

6 THE COURT: If so, why wouldn't it be
7 appropriate for part of the Ten Commandments to
8 have just the last six commandments there?
9 Wouldn't it be perfectly reasonable if it's secular
10 and historical and this dispute is not about God,
11 why not let Giles County post the second six and
12 resolve this matter?

13 MR. STAVER: I think Giles County could
14 and certainly think it would make it an easier
15 case, but I don't believe that's required to make
16 it constitutional. The reason is you have the same
17 display held up by other places but it's not
18 predominately reasonable for my argument.

19 THE COURT: That's really about God, isn't
20 it? That's why. You don't want to take the top
21 four out because this is all about God.

22 MR. STAVER: I am saying that Giles County
23 can certainly do that and it's another fact that
24 would have to be considered. On the other hand,
25 the Magna Carta mentions God and no one

1 complained --

2 THE COURT: But the Magna Cara doesn't say
3 there shall be no God before me.

4 MR. STAVER: It does mention God.

5 THE COURT: There are lots of historical
6 documents that mention God but not one that says
7 you shall have no God before me and what the first
8 four say, and I guess my question is this: You
9 understand that if you loose this case that the
10 ACLU is going to file a petition for attorneys fees
11 that's going to be in the hundreds of thousands of
12 dollars, and they are going to be asking Giles
13 County to pay for it, right?

14 MR. STAVER: Correct.

15 THE COURT: Why wouldn't it make sense for
16 Giles County to sit down with you folks and see if
17 there is a way to resolve this by posting the
18 secular parts of the Ten Commandments, the bottom
19 six, if it's not really about God?

20 MR. STAVER: Certainly I am not opposed to
21 that. That's not a discussion that has come up
22 before.

23 THE COURT: It's going to come up today.

24 MR. STAVER: I understand. It already
25 has. I am sure we'll get together.

1 THE COURT: I'm going to order it.

2 MR. STAVER: Then we will get together and
3 discuss.

4 THE COURT: It just occurred to me that
5 your argument is about, for example, Pastor Wilburn
6 says I put it up there in 1999 because of
7 Columbine. Nobody wants a Columbine. I mean, it's
8 a terrible thing. Nobody wants kids to kill each
9 other. If it's really about the commandment of
10 thou shalt not kill, take the first four out and
11 put it up on the wall. ACLU shouldn't have a
12 problem with it, you should be happy with it, Giles
13 County saves potentially hundreds of thousands of
14 dollars in legal fees. I just wonder if that isn't
15 a reasonable compromise.

16 I know, Mr. Staver, that both you and Ms.
17 Glenberg both have your own viewpoints. Liberty
18 Counsel advocates a viewpoint. ACLU advocates a
19 viewpoints. I am not sure those two viewpoints are
20 necessarily what the Giles County school board
21 ought to be focusing on. That's for them to
22 decide. So I think I have said that to you and to
23 her.

24 At the close of today's session, I am
25 going to enter an order directing you-all to go to

1 mediation with the magistrate judge. I'm going to
2 ask him to come down and sit down in a room with
3 you and see if there might be a possible way to
4 resolve this. I do believe in today's economic
5 climate with school boards as taxed as they are
6 were dollars and dollars, that the large attorneys
7 fee award, and I understand that. I think it was
8 Mr. Buckland, at the June 7th meeting, you know, I
9 know what happened at the June 7th meeting, Charlie
10 Henderson, who is a big supporter of Giles County
11 public schools says, I'm backing you physically,
12 spiritually and financially and some of the members
13 of the school board said we are taking you to the
14 bank. We are voting for this.

15 Every case, lawyers and their parties,
16 ought to think about whether there's a way to
17 resolve it, short of taking it to the mat. If you
18 want to take it to the mat with me, that's my job.
19 The Fourth Circuit that's their job. The Supreme
20 Court that's their job. I'm saying I would like
21 you-all to sit down and have a conversation.

22 MR. STAVER: Sure. We will certainly do
23 that, and I think probably this would be something
24 that we would address at mediation is whether or
25 not the school were agreeable, what they would face

1 for doing that in attorneys fees.

2 THE COURT: No, no. I agree with you;
3 that's the tradeoff.

4 MR. STAVER: Okay, very good.

5 THE COURT: Let me ask you -- I've got
6 some other questions that I would like to ask you
7 about with regard to this case, but I also don't
8 want to interrupt your argument.

9 One of the things that I was thinking
10 about when I was thinking about this case and the
11 history that happened here. I asked you could it
12 be done differently. If the Giles County school
13 board said let's not vote, let's think about it and
14 do something differently. That would be a
15 different case.

16 But really and truly, given the fact we
17 are dealing with children, can, given what Stone
18 has said, given what they said in VanOrden about
19 schools being different and all those cases talking
20 about schools, is there ever a circumstance that
21 the Ten Commandments can be put up in a public
22 school? Ms. Glenberg said, yeah, in a display with
23 world history. I take it you would take issue with
24 that saying it's perfectly acceptable in the
25 context in which it's presently shown.

1 MR. STAVER: I think it could be displayed
2 in a context with world religion. I don't think
3 that that, itself, would be a violation of religion
4 over non-religion depending upon how it was done.
5 It could if you did it one way and wouldn't if you
6 did it in a neutral and broad perspective way.

7 But I also think that in the context of
8 law, the government or American history or world
9 history, it can also be displayed as well. I think
10 if it can be taught in the curriculum, which it
11 can, we know that the Supreme Court has
12 acknowledged and stated that it can. Even in the
13 Bible as a whole could be as well. Then it makes
14 no logical sense that you couldn't have an
15 objective display also as manifested on the wall
16 that reflects some of or all of the teachings
17 within that school textbook curriculum from a
18 historical standpoint.

19 When we look at the Ten Commandments, it
20 has had a significant influence on the government
21 and law. It has obviously created a system of what
22 has been known as ethical monotheism where instead
23 you have multiple Gods waring against each other,
24 you have order that comes out of a monotheistic
25 ethical reactions that you have ethics that come

1 out of the fact that there are not Gods waring
2 against each other and you're just a pawn in the
3 system.

4 Throughout history it has had a
5 significant influence. It is the very first
6 document in The Book of Dooms published as the very
7 first compilation of common law in world history.
8 It starts off with the Ten Commandments and from
9 there it goes to common law. The Book of Dooms is
10 the first time it's ever been compiled. The reason
11 is because of the influence that it had.

12 THE COURT: The Supreme Court didn't buy
13 that argument in McCreary. You don't even have the
14 14th Amendment in here and you have the Ten
15 Commandments and these other documents.

16 You tried that argument in McCreary and it
17 didn't work.

18 MR. STAVER: But McCreary is, I think,
19 focused more on the unique history of McCreary.

20 THE COURT: Isn't the specific unique
21 history of this case much more like McCreary than
22 Mercer or Grayson County?

23 MR. STAVER: No, because I recall in
24 Grayson, if I remember, certainly it was the pastor
25 who ultimately made the presentation. I'm trying

1 to recall in Grayson whether or not it started as a
2 stand alone brief and then it went to the larger
3 and then Mercer just --

4 THE COURT: I believe that's right. I
5 believe Mercer was simply the foundations display.
6 I think in McCreary, no, Grayson it was stand
7 alone, it was taken down, and then they put a
8 foundations display after McCreary was decided.

9 MR. STAVER: That's right. Then the
10 person who presented it to the board was a minister
11 and there was an attempt by the attorneys in the
12 case to argue that was significant and the Sixth
13 Circuit rejected that. So I think we are more like
14 Grayson, if anything. We are certainly not like --
15 when you have three different kinds of parameters,
16 and they are really on two different extremes and
17 there is one that's more different. You've got
18 McCreary with a stand alone and the second display,
19 and they really focused on that second display
20 because that was significant in its overtness. You
21 couldn't help but see what was happening in that
22 second display and the resolution confirmed any
23 suspicion, if for some reason you didn't see it.

24 THE COURT: The resolution was withdrawn.

25 MR. STAVER: The resolution was withdrawn

1 up on appeal. But one of the arguments for the
2 first time, in fact, the resolution wasn't even
3 really talked about until the actual argument and
4 then at that point in time, I think it was in a
5 brief that was raised, so it had never been
6 withdrawn. So at the time of oral argument it
7 hadn't been withdrawn. Subsequent it was
8 withdrawn. But it was sort of like the Santa Fe
9 case. Santa Fe had multiple or different
10 iterations of the football game prayer, but they
11 had one policy that ultimately empowered the
12 speaker and that original policy and speaker was
13 only going to speak about praying. So when they
14 changed it and it was the same people from the
15 original policy, it was really no difference.
16 McCreary is very similar to that.

17 Then you have on the other hand Mercer
18 County where it just begins as the foundations
19 display and no comments and then you have Grayson
20 begins with a stand alone and then it's presented
21 by a minister and that's upheld just like Mercer.

22 THE COURT: You know, Stone, take no Ten
23 Commandments in public schools, then no reading of
24 the Bible or the Lord's prayer. You've got Santa
25 Fe with the football game. You've got Lee v.

1 Weisman, even to the extent that was a prayer by a
2 Rabbi at a middle school graduation, no
3 nonsectarian prayer. You've got Epperson, you've
4 got Kitzmiller, you've Johnson vs. Poway, the
5 teacher in California putting things on his
6 bulletin board. You've Edwards v. Aguillard, the
7 Louisiana Creationism Act. You've got the
8 Washegesic case.

9 All of those cases are Established Clause
10 violations against schools. Can you give me one in
11 which a federal court said it's okay for the
12 Establishment Clause to agree with you? Can you
13 give me one case in which a federal court said it's
14 okay to put the Ten Commandments up in a public
15 school?

16 MR. STAVER: I think you go back to Stone
17 and Stone says it can be integrated and McCreary
18 cites Stone that it can be integrated into the
19 curriculum.

20 THE COURT: Stone says putting it on the
21 wall violates the Constitution.

22 MR. STAVER: But it wasn't integrated in
23 that case.

24 THE COURT: You are asking me, as the
25 first federal court, to find posting of the Ten

1 Commandments on a school wall is constitutional?

2 Because I haven't found one that says it is.

3 MR. STAVER: There is no case that has
4 dealt with upholding the Ten Commandments in a
5 public school. The ones that I know of would be
6 Stone but Stone says it could be integrated into
7 the curriculum and McCreary cites Stone and
8 reiterates that same aspect of it. And then there
9 is the Harlan County school board case, which also
10 looked at purpose. It had the same singular second
11 display and the foundations display that McCreary
12 and Pulaski have. That went up and ultimately was
13 dismissed later for lack of standing.

14 THE COURT: Last time we had this
15 discussion it was denied in that case and came back
16 down and was mooted.

17 MR. STAVER: I think it was GVR, but
18 definitely they didn't take the case and then it
19 came back down along with McCreary and Pulaski. It
20 went through the courts, McCreary and Pulaski went
21 back up with essentially the same history.

22 THE COURT: McCreary and Pulaski were
23 courthouse cases and Harlan County was a school
24 case.

25 MR. STAVER: Yeah, and Harlan County was

1 dismissed.

2 THE COURT: You're asking me for the very
3 first time to declare that the posting of the Ten
4 Commandments in a public school does not violate
5 the Establishment Clause?

6 MR. STAVER: Under the circumstances of
7 this case, yes.

8 THE COURT: Tell me why up think this
9 Court should reach that conclusion.

10 MR. STAVER: There are a couple of
11 different reasons. First, we talked a little bit
12 about -- I have never seen any other case or heard
13 of any other case where it has an integration
14 curriculum like this. So I think we have a classic
15 iteration of Stone.

16 THE COURT: Is this integration in the
17 curriculum or is this in Dr. Webb's words a
18 smokescreen?

19 MR. STAVER: Doctor Webb also said he had
20 no proof. That was just his own personal view, and
21 he was one of the dissenters of it, but I don't
22 think that carries a lot of weight with regards to
23 intent.

24 THE COURT: Isn't the recognition of a
25 smokescreen doesn't that make some sense given the

1 history of January 20th?

2 MR. STAVER: Well, you know, someone might
3 say that like Mr. Webb, and I'm not going to take
4 issue with him. I don't think he is very strong on
5 that position in his deposition or has any evidence
6 that that, in fact, is a smokescreen. He has never
7 gotten any information from his fellow board
8 members and these board members get along very
9 well, and they communicate all the time. They have
10 been with each other for many, many years. He
11 knows this so he doesn't have any information that
12 suggests there is really a smokescreen.

13 THE COURT: There was actually a
14 surprising lack of communication between the board
15 members on this issue before the vote, at least
16 from the depositions.

17 I want to read all the depositions. I
18 like to do that generally. There was a lack of
19 communication between them but that's not
20 surprising before the January 20th meeting.

21 MR. STAVER: They didn't know what was
22 going on. I think it's integrated into the
23 curriculum in a unique way.

24 I know, Your Honor, you were asking that
25 question back in the fall of last year about

1 whether this was integrated in the curriculum. I
2 think the evidence shows it's integrated in
3 multiple different ways; world history, American
4 government. In fact, it's the American government
5 book that one should know about and was recently
6 taught. So it's in that book. We know about those
7 through previous instructions of other children and
8 so forth. So I think it's integrated in a unique
9 way.

10 This is a manifestation of those
11 particular documents that are taught in the
12 curriculum. And Doe 2 specifically says that Doe 2
13 would agree with the statements in the textbook
14 actually even reciting the textbook quotes, and
15 said I agree with that. But the only reason why
16 Doe 2 opposes this is because in Doe 2's mind there
17 is no First Amendment case that has allowed this in
18 a school on a wall.

19 Other than the actual concepts of it, Doe
20 2 doesn't have any objections to it. The other
21 thing that's different is we do a forum in this
22 particular case. I know --

23 THE COURT: How can there be a forum if
24 the school board just says we are going to approve
25 it, and they don't establish any criteria and they

1 have unfettered discretion? How can it be a
2 limited public forum?

3 MR. STAVER: I don't think they have
4 unfettered discretion and whether they do or not is
5 not before the Court. It would have to be a
6 challenge if somebody were wanting to come there,
7 post it, they're denied, and then they have an
8 unfettered discretion challenge. We don't have
9 that.

10 It could be explained more but certainly
11 what they have is that the documents have to be
12 historical and relevant to history. So there
13 review is fairly limited but it is a review so that
14 it is consistent with the limited purpose of the
15 forum.

16 They can create a limited forum, and they
17 did and that forum is for historical documents and
18 there's no problem with creating a limited forum.

19 THE COURT: Is there a case that you can
20 cite me that involves a limited public forum
21 involving putting documents on a wall as opposed to
22 -- the limited forum cases are a Christian group
23 that wants to show movies after school hours about
24 family values. That was the Lamb's Chapel case, I
25 think. And then there is the one, The Good News

1 Club. I think you were involved in that case. It
2 was about a Christian group that says we want to
3 have a Christian group after school just like they
4 have another group. The school said, no, there is
5 an Establishment Clause problem there and the court
6 said, look, free expression. People have the
7 Access Act. You can't exclude them simply because
8 they are religious. What about the school board --
9 in all those cases and even the Upshur case, where
10 they handed out Bibles, in all those cases the
11 school board took pains to say we are not putting
12 our stamp of approval on this. We are not going to
13 sanction the content of any particular club.

14 But here they are putting their stamp of
15 approval. They are posting it on the wall of the
16 Giles County public school. Isn't that a deference
17 with these limited public forum cases?

18 MR. STAVER: Well, there is not a case
19 that I'm aware that has a limited public forum on a
20 wall in a school.

21 THE COURT: So you are asking me to do
22 that for the first time, too?

23 MR. STAVER: There always has to be a
24 first time, that's correct. Even in the public
25 forum cases, we've litigated a number of them and

1 they are the first of their kind in the country.
2 Because all of these are different configurations
3 of facts in public forums like, for example, The
4 Goods News Club in 2001. The question is whether
5 or not that's just for access to a space and courts
6 have flushed that out and said, no, it's not just a
7 space and facility but also the time of the meeting
8 as well. You can't have everyone meeting at a
9 certain time and then have you meet much later in
10 the evening.

11 There is also access to announcements, in
12 terms of getting information out. That was after
13 the 2001 cases. That's also equal access. I think
14 there are a lot of different iterations that came
15 out of that, and I think this is an iteration that
16 has come out of the Ten Commandments. The Ten
17 Commandments litigation historically other than
18 Stone, between Stone and I think there is a 1970
19 case or so, there is only a couple of Ten
20 Commandment cases ever decided before 1999 and if
21 you look at the chart of them --

22 THE COURT: Is that all because of Judge
23 Moore?

24 MR. STAVER: No, he came after that.

25 THE COURT: When you look at the cases,

1 did you start all of these?

2 MR. STAVER: No, I didn't start them. If
3 you go back and look at the original lawsuits, most
4 of those were started or filed by the ACLU.

5 THE COURT: A lot of the cases seem to
6 start around 1999.

7 MR. STAVER: 1999 was the first case.
8 That's when, I think, 2000, 2001 is when we were
9 first contacted and they had already started. Then
10 in 2005 they hit a peak and then they sort of
11 taper off again. There are different iterations
12 that have happened over the time frame. So this is
13 one of those iterations.

14 When you put all of this together and
15 while there is not this Court precedent that says
16 you can do exactly what you're doing, there is a
17 lot of other court general precedent that says this
18 is, in fact, permissible. The curriculum and the
19 public forum is another.

20 So in the public forum analysis, what they
21 have done is they've actually posted a resolution
22 so if anybody wonders whether they are going by and
23 they're seeing 29 frames, and I think 27 pictures
24 of former graduates of the school that are right
25 next to it but there are 29 of these frames now.

1 So if somebody goes by and says I wonder if this
2 has got the school's stamp of approval how can I be
3 involved in it, there is a resolution that actually
4 tells you how to do it. And, in fact, there are a
5 few who might even do it after this case dies down.
6 So it is open for anyone and the only criteria is
7 fairly a limited one; that is, it has to be
8 historic.

9 THE COURT: And subject to the board's
10 approval.

11 MR. STAVER: Right. But then equal access
12 is subject to the approval process as well. That
13 it be limited to equal access for organizations
14 that are providing a benefit for some kind of open
15 access to the students. And so if you don't meet
16 that criteria, if you are having a Tupperware party
17 or Amway meeting, the school or government can say,
18 no. In this particular case they limited it to a
19 limited topic and that is the topic of historical
20 documents. The reason is that based upon the
21 history of February 15th on, that the SOLS and
22 teaching history are important, and they want to
23 make sure they are integrated in.

24 Now, with regards to the 29 documents that
25 are there, or the 29 different frames, all of those

1 at one point or another are somewhat into this
2 curriculum. So they have a connection to what is
3 actually being taught in the public school.

4 THE COURT: Don't you think the
5 explanation of the Jefferson documents flies in the
6 face of the 14th Amendment of the United States
7 Constitution, where it talks about the states can
8 do whatever they want with religion? That's what
9 the import of the Pastor Wilburn Liberty Counsel's
10 spin on Jefferson is the states can do whatever
11 they want with religion. The 14th Amendment
12 prohibits that.

13 MR. STAVER: I understand.

14 THE COURT: It's a viewpoint on separation
15 of church and state that is inconsistent with the
16 Constitution. How can Giles County have put that
17 on the wall?

18 MR. STAVER: It's not inconsistent with
19 Jefferson, himself.

20 THE COURT: It's not inconsistent with
21 that little piece of Jefferson that you-all chose
22 to focus on.

23 MR. STAVER: I agree that there could be
24 other information or maybe that could even be --

25 THE COURT: There is no discussion of

1 Jefferson staying up late at night with his razor
2 cutting out the parts about the Bible, about the
3 miracles and virgin birth and all that stuff, he
4 didn't believe in. He didn't believe in all of
5 that. He wrote that book The Moral Teachings of
6 Jesus Christ where it's actually called the
7 Jefferson Bible. There is no mention of that in
8 there.

9 MR. STAVER: I understand but even --

10 THE COURT: My bigger problem is the 14th
11 Amendment.

12 MR. STAVER: I understand that the 14th
13 Amendment obviously incorporates whatever was
14 applicable to the federal government is applicable
15 also to the states. There is no question about
16 that. You certainly are not going to get any
17 argument from me on that.

18 THE COURT: I'm not going there. It just
19 occurred to me, what about the 14th Amendment.

20 MR. STAVER: I think and maybe it could be
21 rewarded but I'm not necessarily arguing one way or
22 another on it but what I'm saying is as it relates
23 to --

24 THE COURT: It just strikes me as
25 providing in a limited public forum a particular

1 viewpoint.

2 MR. STAVER: That is certainly not
3 something that we want as a school to do.

4 THE COURT: That's what I was wondering.
5 That's the whole point of my question: Why would
6 the Giles County school board just allow Pastor
7 Wilburn and Liberty Counsel to do whatever they
8 wanted because it expresses a viewpoint that is not
9 necessarily consistent with either history or the
10 law?

11 MR. STAVER: Well, you know, I don't want
12 to say that's a Liberty Counsel display.

13 THE COURT: Well, Mr. Mast, the discovery
14 of this case is Pastor Wilburn sent it to Liberty
15 Counsel, he substantially edited it, sent it back
16 and it was on the wall without discussion.

17 MR. STAVER: I don't know how much of it
18 was done but it didn't originate with Mast.

19 THE COURT: No, it didn't.

20 MR. STAVER: I understand but it didn't
21 originate there.

22 At any rate, my point, though, is that
23 what we have are the limited public forum documents
24 and this Court is very familiar with all of those.
25 What we have here is a limited public forum; that

1 is, so there's two things that really set this case
2 apart, I believe, are the integration to the
3 curriculum which there is no other case that I know
4 of that is anything like this and also the limited
5 forum for historical documents.

6 THE COURT: Let's play devil's advocate
7 for a minute. There is no integration in the
8 curriculum before January 20th, none whatsoever.

9 Let's just say for the sake of argument
10 that I view a limited public forum as a square peg
11 in a round hole.

12 Does the Court after McCreary have the
13 power, the ability to parcel the history and say,
14 look, Giles County you did it wrong before this but
15 after February 15th you got it right or is it too
16 mixed up?

17 MR. STAVER: Yes, the Court can parcel.

18 THE COURT: That's a factual finding.

19 MR. STAVER: Yes, but I think the Court
20 can definitely parcel. As it relates to the forum,
21 square round peg and so forth, at least it also
22 goes towards adding to the secular purpose. In
23 addition to the multiplicity of documents, in
24 addition to the integration, the school board
25 provided opportunities for others that are not like

1 this. So at least it goes as another notch towards
2 a secular purpose.

3 I think this Court can parcel McCreary,
4 itself, says that the court can parcel. Even in
5 that particular case where that significant
6 religious display that's the second with the
7 resolution, the court was very clear to say that
8 they were issuing their order on that preliminary
9 phase on the purpose prong and that they did not
10 say, by doing so, that this would forever taint
11 future displays.

12 THE COURT: But how can I parcel it, just
13 for the sake of argument, when Bobby Lilly proposes
14 his display while the Ten Commandments is still up
15 with the Constitution and it wasn't until a week
16 later that they vote to take it down. The history
17 is so intertwined it's kind of hard to parcel,
18 isn't it?

19 MR. STAVER: No; certainly it could be
20 clearer, but I think it's very clear that what
21 Bobby Lilly proposed and, in fact, what this
22 Court -- what the board -- we don't have any
23 indication of the legislative votes.

24 THE COURT: We do have what the minutes
25 say and Drema McMahon says the Ten Commandments

1 have won. So how is it any different from
2 January 20th to June 7th, if she's saying the Ten
3 Commandments have won. How is it any different?

4 MR. STAVER: I think you cannot use an
5 objector to ultimately undermine the purpose.

6 THE COURT: Well, she says, if you read
7 her deposition, she was in favor of putting the Ten
8 Commandments on the wall. She was just concerned
9 about the resources the schools would pour into the
10 litigation. That was a big concern of hers.

11 MR. STAVER: I understand.

12 THE COURT: That's a legitimate concern of
13 any reasonable board member.

14 MR. STAVER: There is no question that was
15 a legitimate concern of hers, but she is in the
16 opposition in that vote.

17 THE COURT: Mr. Gollehon is not in the
18 opposition. He said I voted to put it up because
19 I'm a Christian. It was the right thing to do.

20 MR. STAVER: I think what you have to do
21 is look at what they did at the time. There is
22 nothing on the face of that in the February vote
23 that they are ultimately taking it down for -- we
24 don't know other than the fact that there was a
25 unanimous vote to put it up and a unanimous vote to

1 take it down.

2 THE COURT: It was clear it was taken down
3 on January 22nd because you-all said you couldn't
4 support the Ten Commandments in their current form.
5 You couldn't defend it so they voted to take it
6 down. That's what they said in the depositions.

7 MR. STAVER: It's unclear exactly, but
8 certainly they had advice from counsel, no question
9 about that. That's in the record.

10 But at any rate, there is nothing in the
11 record that suggests they are anticipating doing
12 something with Bobby Lilly or nothing in the record
13 that says let's backup and undo this. Let's go
14 back and reconsider Bobby Lilly. There is nothing
15 in the record to that effect. We do have Bobby
16 Lilly that predates by about a week that vote but
17 there's nothing in there that connects those two
18 together.

19 THE COURT: It's a shame we don't have
20 real board meeting tapes as opposed to -- but it is
21 what it is. It's the board minutes and it's the
22 evidence, and we have the depositions and we'll
23 just do it.

24 MR. STAVER: The one thing I would say,
25 Your Honor, is the Bobby Lilly display is different

1 than anything that went on before it. It's
2 fundamentally different because there is definitely
3 an attempt to integrate it into the curriculum.

4 THE COURT: I think that's your best
5 argument, and I hear you. I am going to study the
6 issue and we'll come up with a ruling that, you
7 know, my rule as district court is to follow the
8 law. That's what I will do. I will follow the law
9 that's set down and if the Court of Appeals or the
10 Supreme Court wants to change it that's their
11 prerogative, but I will follow the law. That's my
12 job.

13 MR. STAVER: That's all we are asking you
14 to do. If I might, if you have further questions
15 about this maybe Mr. Crampton can answer them.

16 It's in our motion for statement of
17 undisputed material facts, and I can send this to
18 you but I can say it as well. If we go through
19 paragraphs one through five, we didn't find any
20 objection to those paragraphs or proposal.

21 Paragraph six, no, substantive objection
22 other than in terms of how it's worded.

23 Paragraph seven through 14, no objections
24 to it.

25 Paragraph 15, there is some objection to

1 it so we are not --

2 THE COURT: I'm sorry, the ones you said
3 there are some concerns.

4 MR. STAVER: I will go through and give
5 you no objection. Paragraphs one through five, no
6 objection.

7 Paragraph six, partial, at least
8 objection.

9 Paragraph seven through 14, no objection.

10 Paragraph 15, partial objection to it.

11 Paragraphs 16 through 27, no objection.

12 Paragraph 28, there is an objection.

13 Paragraphs 29 through 65, no objection.

14 Paragraph 66, there is an evidentiary
15 objection by plaintiffs.

16 Paragraph 67, also an evidentiary
17 objection.

18 Paragraphs 68 through 76, no objection.

19 Paragraph 77, an objection.

20 Paragraphs 78 through 81, I don't think
21 there is any objection. I think there might be
22 some quibbling on 82.

23 Paragraphs 83 through 86, no objection.

24 Paragraph 87, they take issue with whether
25 or not we misquoted Doe 1.

1 Paragraph 88, there is an objection.

2 Paragraphs 89 through 96, no objection.

3 Objections as to 97 through 99.

4 No objections from 100 through 108.

5 Partial objection to 109 and objections
6 from 110 to 117.

7 THE COURT: Anything further?

8 MR. STAVER: No, I think that's all, Your
9 Honor.

10 THE COURT: Do you want Mr. Crampton to
11 make any argument at this time?

12 MR. CRAMPTON: If I may, Judge, I have a
13 very short statement.

14 THE COURT: Sure. Mr. Staver, I'm going
15 to let Ms. Glenberg follow up and then I'm going to
16 give you a chance to conclude with anything else
17 you want to say.

18 MR. CRAMPTON: Your Honor, may I say I
19 very much appreciate your candor as well as
20 indulgence here. I will try to keep it brief. I
21 just want to hit a few of the evidentiary
22 highlights and sort of back it up. I know in many
23 respects the horse having already been out of the
24 barn but McCreary, itself, makes it very clear that
25 where the analysis begins for legislative purpose

1 is an objective test. It's legislative purpose not
2 individual motives. You don't pierce that veil, as
3 it were, as the Court put it Establishment Clause
4 analysis does not look to the veil psyche of
5 government officers, unless the objective evidence
6 on the surface actually indicates something
7 impermissible, something amiss. Now, we would
8 argue that all the way through those January
9 minutes and the hearing thereto, there was no such
10 thing. But His Honor has indicated that he did
11 find that something that caused him unease with the
12 January meeting. Let's consider if that is His
13 Honor's pleasure. Even then, what you do is you
14 then do look behind the veil and consider some of
15 that testimony, but only then. But when you do so,
16 it's afforded very limited weight according to the
17 United States Supreme Court.

18 Now, what happens here? You have the
19 testimony of Ms. McMahon and that unfortunate
20 comment that His Honor pointed out in the minutes
21 of January 20th. In her deposition, however, that
22 page 20, and I quote: I'm almost sure that I did
23 not say the second sentence.

24 That's the sentence about thank you for
25 your support of the Ten Commandments.

1 THE COURT: Somebody did. That's what's
2 in the minutes.

3 MR. CRAMPTON: I understand that. To the
4 extent you want to consider the individual
5 testimony of the board members, Ms. McMahon said
6 she didn't say that.

7 THE COURT: Someone else may have.

8 MR. CRAMPTON: I would say that's true.

9 THE COURT: She said she thought she was
10 the only one she knew of that would use the word
11 thrill. That's what she said in her deposition.

12 MR. CRAMPTON: I understand. That's why
13 she thought that was her comment.

14 There has been a great deal of discussion
15 regarding Pastor Wilburn and his expressions and
16 his purpose for the donations and so forth. Well,
17 the Fourth Circuit, itself, in Peck made it very
18 clear that the religious motives of a constituent
19 cannot be imputed to the official who simply
20 responds to his request.

21 THE COURT: What about footnote 10 of
22 Greene where it says: Where the board simply acts
23 following a religious motive and simply acts on it
24 without anything more it's appropriate for the
25 court to infer religious motive. That's footnote

1 10 of Greene. That's also, I think, in footnote 10
2 of Grayson County.

3 MR. CRAMPTON: I believe that was cited by
4 the ACLU, Your Honor, but you maybe right.

5 THE COURT: It's cited by you as well.

6 MR. CRAMPTON: But even so, when you're --
7 depending upon which meeting we're talking about,
8 there is no impermissible suggestion at the June
9 7th meeting as far as I know. I don't think there
10 has even been a suggestion by the ACLU that Mr.
11 Lilly was motivated by some illicit religious motive.

12 THE COURT: There is religion throughout
13 the entire spring of 2011. It's there throughout
14 all these meetings.

15 MR. CRAMPTON: I would respectfully
16 suggest that His Honor has set aside that rule of
17 deference that he made reference to in the
18 beginning.

19 THE COURT: Okay, let me just ask you:
20 January 20th, where is there any secular purpose
21 shown?

22 MR. CRAMPTON: Mr. Buckland's comment.

23 THE COURT: On January 20th?

24 MR. CRAMPTON: Yes, sir. I am sorry I
25 don't have those minutes before me. But, again, I

1 believe what he was talking about is, again, the
2 financial concern right after the mention of the
3 vote. He was the chairman. Mr. Buckland stated,
4 no board member wanted to do this but we have an
5 attorney who advised us. We tried to abide by the
6 law. We want our children to understand that there
7 are laws in this country, and he is talking about
8 financial -- we understand and we've had assurance
9 from Giles County board of supervisors --

10 THE COURT: Yeah, that's Mr. Gentry from
11 the board of supervisors that says: We would
12 rather fight the ACLU or whoever would come up than
13 have one anonymous coward who would not even sign
14 the letter come in and tell us how to run our
15 schools.

16 That's what he's talking about. Then
17 we've got a board member stated they were thrilled
18 with the attendance at the meeting, everyone was
19 thanked for their supporting the Ten Commandments.

20 What Mr. Buckland is talking about is, we
21 are sorry we took it down to start with but the
22 attorney told us to do it.

23 Where is the secular purpose in putting it
24 up back up on January 20th?

25 MR. CRAMPTON: I would submit, Your Honor,

1 that, again, you have to consider the context and
2 history here. When the original display went up,
3 Doctor McCracken was unequivocal and supported also
4 by Mr. Buckland's testimony in his deposition.
5 This was a return to foundations and return to
6 basics.

7 To put up something that the board in good
8 faith believed was a foundations display, not a Ten
9 Commandments display, is not an impermissible
10 purpose. Moreover, that fact that some of the
11 crowds people showed up and talked about the Ten
12 Commandments is perfectly understandable, again, in
13 the context of what document was taken down. The
14 Constitution wasn't removed. The Ten Commandments
15 were removed. So they are talking about the Ten
16 Commandments because that's the missing link, as it
17 were, in this display.

18 THE COURT: So this is not about religion?
19 This is about historical documents, is that what
20 you're saying?

21 MR. CRAMPTON: That's exactly what I'm
22 saying.

23 THE COURT: Why doesn't Giles County just
24 post the second six? Why do they have to have the
25 first four that refer to God? If it's not about

1 God, then why are we having this argument?

2 MR. CRAMPTON: For the same reason that as
3 Mr. Staver eluded to, you don't sensor out the word
4 God in the Declaration of Independence, Your Honor.
5 If this were an artistic creation, a movie of some
6 sort --

7 THE COURT: This whole thing has gotten
8 all blown out of proportion because it is about
9 God. That's why this whole thing -- that's why we
10 are here.

11 MR. CRAMPTON: I would submit, Your Honor,
12 that that is what motivates the lawsuit having been
13 filed in the first place and the press that reports
14 upon it and enjoys a good dispute and controversy.

15 THE COURT: Shouldn't the reasonable
16 observer, who is watching all this that happened in
17 the spring of 2011, shouldn't the reasonable
18 observer when you're looking to the effect or the
19 endorsement test, the second prong of Lemon,
20 shouldn't the reasonable observer be entitled to
21 consider that as Greene said in footnote 10 as
22 Grayson County says in footnote 10?

23 MR. CRAMPTON: I think that is a distinct
24 minority position. There is no US Supreme Court
25 case that holds to that effect.

1 THE COURT: Epperson.

2 MR. CRAMPTON: Epperson was a purpose
3 case, I believe.

4 THE COURT: Yeah, you're right. In
5 Epperson the Supreme Court considered deposition
6 testimony of someone as to purpose and that was
7 considered in Epperson because that is noted in
8 footnote 10 of Greene. You-all want to consider
9 the purpose as set forth by Doctor McCracken
10 because you like the purpose. But then when the
11 purpose is from the school board members when they
12 voted on this because they are Christian, you want
13 me not to consider it. You're talking out of both
14 sides of your mouth.

15 MR. CRAMPTON: I would take issue, as Mr.
16 Staver eluded to, there were no board members when
17 Doctor McCracken said --

18 THE COURT: But you want me to consider
19 his purpose.

20 MR. CRAMPTON: If this Court wanted to be
21 perfectly consistent and consider none of their
22 purposes, we would be just fine with that because
23 the deference -- the presumption of
24 constitutionality.

25 THE COURT: I think the Supreme Court

1 requires me to consider purpose, it requires me to
2 consider history, it requires me to consider
3 context, and I think I would be doing what was
4 asked of the Supreme Court in McCreary to turn a
5 blind eye to history, if I ignored what happened in
6 Giles County.

7 MR. CRAMPTON: If I may quote from
8 McCreary citing the various cases where this
9 pierces the veil. In each case the government's
10 action was held unconstitutional only because
11 openly available data supported a common sense
12 conclusion that a religious objective permeated the
13 government's action. Certainly you've got to
14 pierce that initial veil.

15 THE COURT: Open available data, would you
16 agree with me that what happens at a board meeting
17 is openly available data?

18 MR. CRAMPTON: Absolutely. That's all I
19 have unless His Honor has other questions. Thank
20 you.

21 THE COURT: Let's hear what the ACLU has
22 to say. Anything further?

23 MS. GLENBERG: I would just like to
24 address a few of the specific points raised by Mr.
25 Staver. First of all, in consideration of the

1 statements that were made in the depositions by
2 Doctor Webb and Ms. McMahon, that Your Honor noted,
3 where Doctor Webb said that the documents were a
4 smokescreen and Ms. McMahon said the Ten
5 Commandments wouldn't stay here. The school board
6 suggests that because these two school board
7 members were opponents of the display their
8 testimony should be discounted.

9 I would point out that in addition to
10 being school board members, these two people are
11 reasonable observers who had a front row seat of
12 all the history that happened here and their
13 perception is that the documents were a smokescreen
14 and that the Ten Commandments won the day.

15 I wanted to briefly address what was said
16 about limited public forums and the discretion of
17 the school board. Mr. Staver said that the school
18 board had criteria that it uses to decide which
19 documents to put up and that criteria is whether
20 it's a historic document. But there is no criteria
21 as to when the school board can reject a particular
22 historical document and that's what makes it an
23 exercise of unfettered discretion. If two people
24 offer different historical documents, they can
25 accept one and reject another for any or no reason

1 at all. That's what defines the unlimited
2 discretion of a school board and the public forum
3 argument.

4 THE COURT: What do you say about his
5 curriculum point? He says after February 15th the
6 Bobby Lilly display is all about curriculum and
7 SOLS and doesn't that meet the exceptional
8 circumstances under Stone, which would allow
9 consideration of the Ten Commandments in a public
10 school?

11 MS. GLENBERG: But it fails for a number
12 of reasons. One is the Supreme Court's express
13 statements that this display is not integrated in
14 the sense of having a coherent theme, a lesson that
15 can be understood from the entire display as a
16 whole. The Ten Commandments are not integrated.
17 They are a religious document among all of these
18 documents relating to American --

19 THE COURT: The only religious document
20 among all the other documents.

21 MS. GLENBERG: That's correct, Your Honor.

22 THE COURT: Does that give it less or more
23 significance?

24 MS. GLENBERG: I think that in this case,
25 combined with the fact that there is no explanation

1 of why the Ten Commandments are there, it makes the
2 Ten Commandments stand out more. That they are the
3 sole religious --

4 THE COURT: There is an explanation set
5 forth that says it's the moral foundation for the
6 Declaration of Independence. It says that right in
7 the explanation that goes along with it.

8 MS. GLENBERG: The Supreme Court says that
9 explanation makes no sense. It would make the
10 reasonable observer throw up his hands. So I don't
11 think that the display succeeds in integrating with
12 the curriculum, and I think that the discretion of
13 the SOLS and the fact that the Ten Commandments
14 were plucked from a different SOL than all of the
15 rest from the documents.

16 THE COURT: Where does the Supreme Court
17 say it has to be integrated?

18 MS. GLENBERG: In Stone. And in
19 McCreary's characterization of Stone, specifically.
20 Stone talks about the Ten Commandments can be used
21 if it's integrated. McCreary says Stone emphasized
22 the need to integrate the Ten Commandments in order
23 to demonstrate the secular purpose.

24 THE COURT: Page 867, Stone stressed the
25 significance of integrating the commandments into a

1 secular scheme to forestall the broadcast of an
2 otherwise clearly religious message and for good
3 reason, the commandments being a central point of
4 reference in the religious and moral history of
5 Jews and Christians.

6 There is your integration.

7 MS. GLENBERG: That was exactly the
8 quotation I was looking for.

9 THE COURT: Does not leave room for an
10 argument that secular education is explained.

11 Of course, that's the initial display.
12 That's the initial display, itself. Mr. Staver
13 says this case is different from McCreary and
14 stands strongly in stark contrast because of the
15 second McCreary display. He says that was so
16 blatantly religious that it was plainly in
17 violation of the Establishment Clause. This case
18 is different because it doesn't have the second
19 display. What do you say about that?

20 MS. GLENBERG: Well, several things.
21 First of all, certainly the second display added a
22 lot to the history in McCreary and made it very
23 clear the religious purpose. However, again the
24 court did not say here is the minimum of historical
25 evidence that you need. You look at the entire

1 story and whether the story tells of a purpose
2 that's religious or secular. So I think that
3 missing a particular step is not necessarily
4 constitutionally significant.

5 THE COURT: The court called the display
6 that's in place in Giles County now in McCreary the
7 third display, he called it a litigation point.
8 But it was pretty focused on the second display.

9 Mr. Staver is right, it had a resolution
10 that went along with it and talked about the Prince
11 of Ethics and all that stuff. Isn't McCreary more
12 egregious than this case?

13 MS. GLENBERG: In terms of the sequence of
14 events regarding the types of displays, yes,
15 certainly and certainly that second display is
16 important.

17 This case has other elements and
18 specifically the context in which all of these
19 school board meetings took place in which the
20 religious furor was very prominent. So, yes,
21 McCreary is different in one way but also different
22 in another way.

23 I think regarding the evidentiary
24 questions, I will rest on the briefs unless the
25 Court has specific questions.

1 THE COURT: When I was looking at the
2 issue of the use of other sources, I noted footnote
3 16 in Epperson made reference specifically to ads
4 and letters to the editor there in that case about
5 the purpose of the Arkansas anti-evolution statute
6 in that case. I looked at the district court in
7 Kitzmiller, the Pennsylvania Intelligent Design
8 case where the Court said and I quote: Letters and
9 editorials are relevant to and provide evidence of
10 the Dover communities collective social judgment of
11 ethic curriculum change. The purpose of the
12 private sponsor is relevant under Greene footnote
13 10, Grayson County footnote 10. The Court
14 considered an affidavit of Judge McGinnis as to the
15 purpose of putting up the display in that case.

16 So I understand Giles' argument about the
17 proper role of the Court and not wanting to
18 psychoanalyze or find any hidden motive, but I
19 think there is plenty of precedent that gives the
20 Court the ability to look to the objective facts
21 that have been revealed in discovery and that are
22 set forth in the board minutes, at least from these
23 cases I have found. Obviously, I'm going to study
24 it more.

25 MS. GLENBERG: Your Honor, unless there

1 are more questions, I'm finished. Thank you.

2 THE COURT: Mr. Staver, she says you're
3 not integrated. What do you say about that?

4 MR. STAVER: I would say the federal
5 courts give deference to schools in terms of how
6 they want to run their curriculum.

7 THE COURT: Federal courts aren't supposed
8 to run schools. School boards are supposed to run
9 schools.

10 MR. STAVER: Right, correct, and this
11 school board has a long history of expertise and
12 they know the SOLS, and they know the curriculum
13 and they've proved this and even directed that be
14 consistent.

15 THE COURT: Let me ask you a question
16 because I'm not real clear on this. Just in terms
17 of the history, the foundations display that was
18 put up on June 7th, was that put up in all the
19 schools of Giles County or just put up in Narrows
20 high school?

21 MR. STAVER: Just in Narrows high school.

22 THE COURT: The 18 additional documents
23 that Pastor Wilburn proposed, were those also put
24 up at Narrows high school.

25 MR. STAVER: Yes, sir.

1 THE COURT: As you stand here today, is
2 the Ten Commandments up in any other school in
3 Giles County other than Narrows high school?

4 MR. STAVER: No.

5 THE COURT: That's the only place?

6 MR. STAVER: That's correct.

7 THE COURT: I just wasn't clear about
8 that. The other thing that might help the Court
9 and I don't know if you can do this or not. The
10 pictures that are in the record of the existing
11 displays has some discovery of some things, I would
12 like to see exactly what is on the wall because the
13 pictures in the record you can't really read
14 everything. Is there a way that you could file a
15 supplemental exhibit with the text of the displays
16 as they existed on June 7th and then Pastor
17 Wilburn's 18 more documents?

18 MR. STAVER: We can. I believe they are
19 attached to Mr. Arbogast's affidavit.

20 THE COURT: His affidavit was very long
21 and he had all kinds of things in it.

22 MR. STAVER: I will put it together.

23 THE COURT: If it's already there just
24 tell me where it is. If it's not already there, I
25 just seen pictures of it. The pictures are helpful

1 because they show the nature of the display. I'm
2 not sure -- you certainly can't read all of the
3 words in all of the documents. I have the
4 descriptions that are below, but I'm not sure I
5 have got all of the words on the documents. I can
6 look them up on-line.

7 MR. STAVER: I can supplement it, too.

8 THE COURT: Certainly.

9 MR. STAVER: Your Honor, the Arbogast
10 affidavit exhibit A32 begins with the written
11 portion of the Bobby Lilly's foundations display.

12 THE COURT: Do you have a docket number
13 for that? Is it 37?

14 I understand that's the written
15 explanation but is what is displayed on the walls
16 of Narrows high school more than that? In other
17 words, are there the words from the Magna Carta?

18 MR. STAVER: We have those. That's the
19 explanation. Then if you move over, and I can go
20 quicker if you want me to just give this to you.
21 But it begins with A34, 35 is the actual words of
22 the individual document all the way over to, I
23 believe, A42.

24 THE COURT: I have those for the Pastor
25 Wilburn 2012 display.

1 MR. STAVER: Yes, the written ones begin
2 on A44, and I believe that's the explanation. Then
3 A45 through, I think it's A54, are the individual
4 words.

5 THE COURT: That's great. I don't need
6 anything else from you. He has a lot of pages on
7 his affidavit.

8 MR. STAVER: Also just for the Court as
9 well, on A90 is a display of foundations. Then
10 also there is additional displays and all of them
11 are together all the way to 88. That's a view or
12 several different views. A86 which is the view of
13 just the Wilburn, 87 just one way looking down the
14 hall and 88 looking the other way down the other
15 hallway.

16 THE COURT: They are all on that one
17 hallway?

18 MR. STAVER: Correct. That's where you
19 see the pictures of the individuals. You can't see
20 who they are but people in addition to the displays
21 on the walls.

22 THE COURT: All right. I think I was
23 asking you about integration because Ms. Glenberg
24 says that's what this lacks, it's integration.
25 What do you say to that?

1 MR. STAVER: Well, Ms. Glenberg has not
2 given any reason why it lacks integration. In
3 fact, what we are talking about is integrating into
4 the curriculum and this is a manifestation or parts
5 of the curriculum.

6 THE COURT: Who's decision is that?

7 MR. STAVER: It's the school boards. I
8 think that's where the deference has to be
9 otherwise we micromanage the school boards and
10 certainly the courts are not in the business of
11 doing that. So the school board's decision is
12 looking at the curriculum, that they directed Lilly
13 to do, at least through the chairman, on
14 February 15th said it would be good to integrate
15 this into the curriculum.

16 THE COURT: He just said it would be good
17 if we could do that. Wouldn't the facts be better
18 for you, instead of on January 20th the Giles
19 County school board just saying let's put them back
20 up, if they had said let's study our curriculum and
21 get a committee to look at this and study our
22 curriculum and decide what documents make sense to
23 have on the wall and then they come back with a
24 report and a study and they put it up and the Ten
25 Commandments is one of them. Wouldn't those facts

1 be better for you?

2 MR. STAVER: Yes, they would be better.

3 If we could recreate the facts, that certainly
4 would be better. I think what you ultimately have,
5 here you have an Establishment Clause issue that
6 even the courts struggle with. Even a number of
7 Supreme Court justices have requested that they
8 revisit this.

9 So all of us are having to deal with this;
10 this court, we have to, this school board, even
11 school board members and administrators have to
12 deal with it from a nonlegal perspective. So you
13 go along for 11 years and there is no problem.
14 Then there is a problem and all of a sudden there
15 is this reaction and then the dust kind of settles
16 and then they move forward. I think that's what
17 you ultimately have. No problem, they are going to
18 get sued if they don't do something, they react,
19 they go back, they take it down again, and then the
20 dust settles.

21 When you look at from the time of June 7th
22 until the present, there is no controversy. There
23 is no yard signs, no bumper stickers, no testimony.

24 THE COURT: There is this lawsuit.

25 MR. STAVER: True, but nothing that is

1 going on in the community.

2 THE COURT: Pastor Wilburn said this whole
3 thing is the best thing that ever happened to his
4 congregation since he's been there. It put people
5 in his seats. That's what he says.

6 MR. STAVER: Well, that may or may not be.
7 I'm not here to say.

8 THE COURT: That's what he says in his
9 deposition.

10 MR. STAVER: I understand but that doesn't
11 have anything to do with the school board. In
12 terms of the controversy, it has basically died
13 down other than an article here or there. So it's
14 basically along the pre-December 2010 where things
15 are going on as normal. There is no controversy,
16 no lobbying, there is nothing.

17 So I think that makes a significant
18 difference as well, that this display has not
19 caused that separation or that angst in the
20 community. A lawsuit, itself, or a letter that was
21 pre-lawsuit cannot, itself, be the cause of
22 actually stirring up the division and then look at
23 that division and say obviously there is a
24 religious purpose.

25 When you look at some of the objective

1 things here and how normal people would have
2 reacted, they did the best they could with the
3 information they had and the advice they were given
4 from counsel. They did the best they could as a
5 school board, and I think they are governing in
6 that way.

7 I would say that it is integrated. I
8 think that is their decision to do it, and I think
9 there is plenty of evidence before this Court.

10 One thing I would say, just in closing, is
11 that dealing with the -- oh, by the way, I want to
12 say that the advertisement in Epperson wasn't from
13 a community member it was from a sponsor. So that
14 adds a little bit more credibility towards the
15 evidence as opposed to somebody in the community.

16 THE COURT: But there were also letters to
17 the editor. There were separate letters to the
18 editor as well in Epperson. As I said awhile ago,
19 there is some credit to your argument that the
20 Court needs to be careful and not psychoanalyzing
21 the motive of the board members. I think I do have
22 to look at the whole history, the whole context to
23 do the proper analysis under McCreary.

24 MR. STAVER: I understand. One point on
25 that, and I will conclude with my final point; and

1 this is, if all of the letters and the editorials
2 are going to be relevant in this or any other case,
3 then these things can just simply turn on a letter
4 writing campaign. We don't know who wrote those
5 letters. We've not deposed them or cross-examined
6 them. For all we know it's somebody that is trying
7 to settle the case. I'm not saying that it is but
8 if we start putting weight on letters to the editor
9 it ultimately cuts to our situation.

10 THE COURT: To be clear I haven't focused
11 on that so much as I focused on the statements by
12 the board members in depositions, what is said in
13 the board minutes, themselves, and I think that's
14 pretty good evidence. I've been more focused on
15 that. To be honest with you, I haven't made any
16 decision with regards to all those letters to the
17 editor that are out there. There are so many cases
18 and you have given me so much to read that I've
19 done the best I can. I haven't gotten all the way
20 down the rabbit's road on that one.

21 There is something to be said about being
22 concerned about paying a great deal of evidentiary
23 value to willy-nilly letters to the editor and
24 e-mails and blogs and all that kind of stuff that
25 goes on.

1 So I hear you, and I'm going to pay close
2 attention to that.

3 MR. STAVER: Thank you. One final point.
4 It's on the issue of standing.

5 THE COURT: There's no standing in your
6 briefs.

7 MR. STAVER: We raised it in one of our
8 briefs, I think in our opposition, and that is the
9 issue is redressability in part for Doe 1. We
10 raised that matter in the brief. Doe 1 states that
11 Doe 1 feels ostracized or not a member of the
12 community. Doe 1 points not to the Ten
13 Commandments but to the Bible bus. So if you were
14 to remove the Ten Commandments, there is nothing in
15 that evidence that would show this could be
16 redressed with the concern that Doe 1 has.

17 Doe 2 on the other hand says that the
18 actual statements about the Ten Commandments, Doe 2
19 agrees with in the curriculum and believes it's
20 permissible to put in the curriculum what you have
21 on the wall. The only reason Doe 2 objects is that
22 Doe 2's understanding of Stone doesn't allow them
23 on the wall. That doesn't give standing. When Doe
24 2 agrees with substance but only objects, not
25 because Doe 2 disagrees with the substance, but

1 believes that the Supreme Court doesn't allow it.
2 That's not standing. For those reasons we believe
3 that there is a serious standing issue as well and
4 at the end of the day the case should be dismissed
5 for lack of standing.

6 THE COURT: Thank you, Mr. Staver. I
7 appreciate it.

8 Anything else the ACLU wants to say on
9 behalf of Doe 1 and Doe 2?

10 MS. GLENBERG: Your Honor, if the Court is
11 inclined to take this issue very seriously I would
12 like an opportunity to brief it. But just as an
13 additional matter in these religious display cases
14 the Fourth Circuit has made it very clear that the
15 injury that is standing to the plaintiff is that
16 caused by unwelcome direct contact with a religious
17 display which appears to be endorsed by the state.

18 There is no question that that's what
19 happened here. Doe 1 has made it clear that he
20 objects to the Ten Commandments. He believes they
21 promote a religious viewpoint. That's all he needs
22 to have standing.

23 THE COURT: I think he said the Bible bus
24 caused him greater concern but he did object to the
25 Ten Commandments as well.

1 MS. GLENBERG: That is a red herring, Your
2 Honor. First of all, the Bible bus was mentioned
3 in Doe 2's deposition and not in Doe 1's. She
4 mentioned it as an additional thing that he was
5 concerned about. He never said it's really the
6 Bible bus not the Ten Commandments. The Bible bus
7 concerned him when he was in elementary school when
8 the Bible bus was an issue. The Bible bus is no
9 longer an issue. He's in high school and there is
10 no reason to think that this lawsuit is about the
11 Bible bus rather than the Ten Commandments.

12 Doe 2's feeling that the statements in the
13 textbook are permissible. Does not deprive Doe 2
14 of standing. Doe 2 is very clear that it's a
15 parent's role to educate the kids and that the
16 placement of the Ten Commandments on the wall had
17 an indoctrinating affect that interfered with the
18 parent's right to provide the religious instruction
19 for the child.

20 So, Your Honor, there is simply nothing in
21 the record to indicate that Doe 1 and Doe 2 will
22 not be adequately redressed by the removal of the
23 Ten Commandments on the wall.

24 I would be happy to answer any questions
25 on that issue.

1 THE COURT: If I need additional briefing
2 I will let you know. Anything further from the
3 Giles County folks?

4 MR. STAVER: No, Your Honor, other than I
5 think one of the places that we mentioned standing
6 is in our reply brief in support for motion for
7 summary judgment pages 25 and 26.

8 THE COURT: I don't know if it
9 specifically said standing, but I remember seeing
10 the issues that you raised with regards to Doe 1
11 and 2.

12 I will deal with that. Now, before we
13 adjourn, what I would like to do is ask counsel and
14 if there are any members of the school board here
15 for Giles County, perhaps the superintendent of
16 schools, if the superintendant is here, to go into
17 the jury room. I am going to ask the magistrate
18 judge to speak to you all for a minute about
19 convening a mediation in this case.

20 If there is nothing further, I'll ask the
21 marshal to declare a recess.

22 (Proceedings concluded at 3:00 p.m.)

23
24 * * * * *

25

1 CERTIFICATE OF COURT REPORTER

2
3 I, Janelle A. Mundy, Notary Public in and
4 for the Commonwealth of Virginia at Large, whose
5 commission expires July 31, 2012, certify that I
6 reported verbatim the proceedings in the United
7 States District Court for the Western District of
8 Virginia, at Roanoke, Virginia, in the captioned
9 cause, heard by the Honorable Michael F. Urbanski,
10 Judge of said court, on May 7, 2012.

11 I further certify that the foregoing
12 transcript, to the best of my abilities,
13 constitutes a true, accurate and complete
14 transcript of said proceedings.

15 Given under my hand and notarial seal on
16 this 1st day of June, 2012.

17
18
19 _____
20 /s/ Janelle A. Mundy
21 Notary Public for the
22 Commonwealth of Virginia
23
24
25